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Supreme Court, U.S.
FILED

031412 APR 7 - 2004

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No.

IN THE

Supreme Court of the United States

Coastal Petroleum Company, Charles E. Arnold, et al., and Robert W. Clark, et al.,

Petitioners,

v.

State of Florida, Department of Environmental Protection, and Board of Trustees of the Internal Improvement Trust Fund,

Respondents.

Petition for Writ of Certiorari to the District Court of Appeal, First District, State of Florida

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1) Does a property owner's agreement to comply with environmental permitting laws operate as an inherent limitation on the property making it a conditional right, constitutionally unprotected against a taking before an environmental permit is granted?

2) Does the possibility that an indefinite government policy may change in the future preclude a finding that the policy effects a taking of a lease issued by that government when the sole use of the lease is prohibited by the application of the policy?

LIST OF PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

The parties to the proceedings below were the Petitioner, Coastal Petroleum Company, the Respondents, State of Florida, Department of Environmental Protection, and the Board of Trustees of the Internal Improvement Trust Fund. Appearing as Intervenors in the proceedings below and Petitioners here are two groups of individuals herein referred to as Charles E. Arnold, et al., and Robert W. Clark et al..

The Charles E. Arnold, et al., Group is comprised of Charles E. Arnold, Robert L. Arnold, Jr., Julian Arnold, Lolly Arnold, Lucile C. Arnold, Melissa Arnold, Thomas R. Arnold, William W. Arnold, William W. Arnold, As Trustee, Alice Lucile Schultz, Jean R. Burn, Joseph L. Carrere, John F. Carrere, Jr., Michael L. Carrere, Charles R. Cole, George T. Cole, Richard P. Cole, Almeria T. Cottingham, Leslie L. De Galbert, Elizabeth Fish Carrere Trust, C. Sheldon Lykes Eustis, A. L. Geary, Ann H. Goodhue, Jean B. Grace, Grace A. Graper, H-A Energy, LLC, Joseph H. Hale, Sarah Hale Eagle, Mary A. Hale, William L. Helfenstein, Carol Mckay Irvin, Carla Kelly, Estate Of T. Paine Kelly, III, Jean B. Kelly, T. Paine Kelly, Jr., Helen T. Kerr, Letitia L. Knapp, Shirley L. Knight, Allison Lykes, Bonnie Lykes, Mjja, Ltd., Fredrick E. Lykes, Heather Lykes, Joseph T. Lykes, III, Trustee Of The Anne Chandler Lykes Trust Agmt., M. Brinton Lykes, Thompson M. Lykes, Timothy Lykes, William T. Lykes, Andrew K. Macfarlane, Howard P.Macfarlane, Hugh C. Macfarlane, Trustee Of Jean Stanley Trust, Hugh C. Macfarlane, Jr., Sue B. Maclay, Charles A. Mckay, Suntrust Bank As Trustee For Herbert G. Mckay Rev. Trust, Howell A. Mckay, E.W. Netscher, Kay Perez, John Pinkerton, Tom L. Rankin, Frederica M. Thompson, Sarah M. Wiley, Cathryn Ehrlich, Hazel Alexander, and W. T. Morris, Jr..

The Robert W. Clark, et al., Group is comprised of Robert W. Clark, Carolyn K. Clark, F. Bowie Ducan, II, Cameron Duncan, Jr., Mayo Lykes, Matilda Webb Brabson, Stella F. Thayer, H. Tyson Lykes, II, Nancy L. Wooten, Ruth W. Bierley, Howell L. Ferguson, Mason M. Lykes And Charles P. Lykes, Jr., as Trustees under Will of Charles P. Lykes, Charles P. Lykes, Jr., Keenan Kelsey, Richard C. Colton, Jr., Elizabeth L. Colton, F.E. Lykes Foundation (f/k/a Aboly Foundation).

Pursuant to Supreme Court Rule 29.6, Coastal Petroleum Company, as a corporate filer, hereby lists Coastal Caribbean Oils & Minerals, Ltd. as its parent company.

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v.

State of Florida, Department of Environmental Protection, and Board of Trustees of the Internal Improvement Trust Fund,

Respondents.

Petition for Writ of Certiorari to the District Court of Appeal, First District, State of Florida

PETITION FOR WRIT OF CERTIORARI

The Petitioners Coastal Petroleum Company and Charles E. Arnold et al., and Robert W. Clark, et al., respectfully pray that a writ of certiorari issue to review the December 3, 2003, judgment of the First District Court of Appeal, State of Florida, affirming the November 15, 2002 Final Judgment of the Circuit Court for the Second Judicial Circuit in and for Leon County, Florida, and the denial of Coastal's motion for clarification, rehearing, certification and request for a written opinion, that the Court denied on January 9, 2004.

OPINIONS BELOW

The opinion of the First District Court of Appeal, State of Florida, is reported at 864 So. 2d 402 (Fla. 1st DCA 2004), and is reprinted in the Appendix to this Petition, p. 1. The November 15, 2002, opinion of the Circuit Court of the Second Judicial Circuit, in and for Leon County, Florida after trial in case No. 01-101, is unreported, but is reprinted in the Appendix, p. 2.

The prior October 6, 1999, opinion of the First District Court of Appeal, State of Florida affirming the denial of a permit to drill and directing the taking issue to be resolved in circuit court is reported at *Coastal Petroleum Co. v. Florida Wildlife Federation*, 766 So. 2d 226 (Fla. 1st DCA 1999), and is reprinted in the Appendix, p. 32. That decision reviewed the State's denial of Coastal's permit to drill as set out in its final order in *Florida Wildlife Federation v. Department of Environmental Protection and Coastal Petroleum Co.*, 21 F.A.L.R. 671 (DEP May 22, 1998) (App., p. 36) The Recommended Order rejected in part by the State in denying the permit follows the final order. (App., p. 55) Prior opinions concerning the same permit are also reprinted in the index: *Coastal Petroleum Co. v. Dept. of Environmental Protection*, 649 So. 2d 930 (Fla. 1st DCA 1995) (App., p. 141). (reversing a permit denial for refusal to post a $515 bond), *Coastal Petroleum Co. v. Chiles*, 672 So. 2d 571 (Fla. 1st DCA 1996) (App., p. 133), and *Coastal Petroleum Co. v. Dept. of Environmental Protection*, 672 So. 2d 574 (Fla. 1st DCA 1996) (App., p. 139). (reversing a permit denial for refusal to post $1.9 billion bond)

STATEMENT OF JURISDICTION

The Petitioners seek review of the December 3, 2003, judgment of the First District Court of Appeal, State of Florida, affirming the November 15, 2002 Final Judgment of the Circuit Court for the Second Judicial Circuit in and for Leon County, Florida. Coastal filed a Motion for Clarification, Rehearing and Certification and Request for a Written Opinion and the Court denied that motion on January 9, 2004. Review by the Supreme Court of Florida was not available because the First District Court of Appeal, State of Florida did not issue a written opinion and the case did not otherwise fall within the Supreme Court's discretionary jurisdiction. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a). This Petition is timely filed.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution, stating ". . . nor shall private property be taken for public use, without just compensation," is involved in this case, as is Section 377.241, Florida Statutes as is set out in the Appendix at p. 17.

STATEMENT OF THE CASE

This case addresses the right to protection under the Takings Clause of an oil and gas lease sold by the State of Florida to Petitioner, Coastal Petroleum Company.

The origins of this dispute date back to December 27, 1944, and March 27, 1946, when Coastal Petroleum Company (Coastal) purchased Florida oil and gas Drilling Leases Nos. 224-A and 224-B from the State of Florida. Coastal's Leases covered about 4,000,000 acres of State of

Florida offshore sovereign lands. The leased properties ran from the shoreline to 10.36 miles offshore, and from just west of Apalachicola, along the Gulf Coast, to just south of Naples. Lease 224-A is in north Florida extending from Apalachicola to Pasco County, while Lease 224-B extends from Pasco County to just south of Naples. This case concerns Lease 224-A.

The Leases were issued to Coastal, "for the sole and only purpose" of drilling for and producing oil and gas from state offshore lands for so long as Coastal met the drilling requirements and paid annual rentals or royalties. (App., p.147) In return, the State received monetary compensation at the time the Leases were entered, required Coastal to pay annual rentals, and reserved a 1/8th royalty for itself, entitling the State to one barrel of oil out of every eight barrels produced. The State of Florida, through its land ownership arm, the Trustees of the Internal Improvement Trust Fund (Trustees), affirmed in the Leases, that each leasehold conveyance was in the State's "best interest." (App., p. 164)

In *Watson v. Holland*, 20 So. 2d 388 (Fla. 1945), Florida's Attorney General challenged the Leases, but that challenge was rejected and the Leases held valid by the Florida Supreme Court. The Court in *Watson* also held that oil and gas drilling was not a nuisance. *Id*, at 394. Thereafter Coastal and its partners began exploring Coastal's leasehold properties and by 1968 had spent more than $16,000,000. A total of eleven non-producing offshore wells were drilled by Coastal and its partners on the more than four million acres covered by the Leases. In 1968 the State again challenged the validity of these Leases, this time in United States district court in Miami, Florida. That court too upheld the validity of the Leases. On January 6, 1976, while the State's appeal was pending in the Court of Appeals for the Fifth Circuit, Coastal and the State of Florida agreed to a settlement. That

Memorandum of Settlement (Settlement) was incorporated into a consent decree entered by the federal court. (Settlement at App., p. 167).

The Settlement divided the 10.36 mile wide coastal strip into three lengthwise bands. In the Settlement, Coastal surrendered all lease rights on the Leases except in the outer three mile wide band from 7.36 to 10.36 miles offshore where Coastal retained its lease rights and the State retained its 1/8th royalty. (App., p. 172) The remainder of the Settlement divided the inner 7.36 mile band of the original Coastal Leases into two strips. The band running from 4.36 miles to 7.36 miles was returned to the State free and clear of all leasehold interests. On the inner band running from shore to 4.36 miles out, Coastal's leasehold interest was converted to a $1/16^{th}$ royalty. Coastal also agreed that its leasehold and royalty interests only covered wells that started production within 40 years, or before 2016, otherwise they would be returned to the State at that time. The Settlement also reduced Coastal's drilling obligations.

One of the issues in the case that resulted in the Settlement was whether the Trustees owed Coastal compensation for the taking of limestone from areas covered by another of its Leases. The federal court before settlement had found that Coastal was not entitled to compensation for this taking. In the Settlement this holding was modified when the Trustees agreed that:

> Any use of minerals **other than oil and gas** for a public purpose by the Trustees or any government body so authorized by the Trustees may be made without Coastal's approval and without payment of any compensation or royalties to Coastal.

(App., p. 170-171) (emphasis added). There was also an uncertainty as to what permitting regulations governed drilling under the Leases. Paragraph 6 clarified the uncertainty:

> Coastal shall secure permits from all appropriate State environmental protection agencies in compliance with the then existing laws and regulations, prior to any drilling or mining.

(App., p. 173) It is this paragraph that the trial and the appeal below turned upon.

In the late 1980's, after a natural gas discovery by Chevron off the Florida coast, Coastal sought seismic exploration permits from the State in order to further explore its lease areas at new horizons. The State granted such a permit to Coastal in 1990.

At the same 1990 meeting at which the permit was granted though, the Florida land Trustees adopted a general policy prohibiting drilling on offshore sovereign lands, including those covered by Coastal's leasehold and royalty. Later that year, the Florida Legislature codified that policy in Chapter 90-72, Laws of Florida, after noting that the increased interest by the oil and gas industry in exploring the outer continental shelf off the Florida Coast could pose environmental risks to Florida's Coastal waters. (App., p. 176).

On its remaining leasehold interest, in 1992, Coastal filed an application to drill a well to test an oil prospect eight miles off St. George Island in Franklin County, Florida, located on Lease 224-A. The Department of Environmental Protection (DEP) denied the permit for Coastal's refusal to post a $515 million bond. That bond was determined to be

illegal and the denial was overturned, *Coastal Petroleum Co. v. Dept. of Environmental Protection*, 649 So. 2d 930 (Fla. 1st DCA 1995) (App., p. 144). Relying upon Paragraph 6 of the Settlement, the Trustees demanded a larger surety bond of $1.9 billion and when Coastal refused to post it, DEP denied the permit a second time. Florida's First District Court of Appeal held Lease 224-A to be constitutionally protected property that could not be impaired by using Paragraph 6 of the 1976 Settlement, *Coastal Petroleum Co. v. Chiles*, 672 So. 2d 571 (Fla. 1st DCA 1996) (App., p. 138), and the permit denial was again overturned. *Coastal Petroleum Co. v. Dept. of Environmental Protection*, 672 So. 2d 574 (Fla. 1st DCA 1996) (App., p. 140).

On remand and after a three week hearing, an Administrative Law Judge (ALJ) recommended that the permit be granted. *Florida Wildlife Federation v. Department of Environmental Protection and Coastal Petroleum Co.*, 21 F.A.L.R. 671, 682 (1998). Despite adopting all of the ALJ's findings of fact, DEP denied the permit for the third time by changing its interpretation of Section 377.241, Florida Statutes, to allow it to balance "policy interests" to deny the permit for environmental reasons. (App., p. 53). On appeal, the Florida appellate court in *Coastal Petroleum Co. v. Florida Wildlife Federation*, 766 So. 2d 226, 228 (Fla. 1st DCA 1999) (upheld the State's third denial of the permit, but said:

> With respect to the constitutional challenge to DEP's interpretation of the statute, the issues of contract impairment and taking go hand-in-hand. **There is no dispute that the appellant has a viable contract with the State of Florida** to explore for and extract oil from submerged sovereignty lands. **DEP's interpretation and application of the permitting statute, based on its determination that there is a**

> **compelling public purpose in not allowing the appellant to drill off shore, effectively prevents the appellant from exercising its rights under the contract.** DEP's action would be unconstitutional only if just compensation is not paid for what is taken. Fla. Const. Art. X, §6. This is a matter to be resolved in the circuit court. ...
>
> * * * * *
>
> ON MOTIONS FOR REHEARING, CLARIFICATION OR CERTIFICATION ...
>
> Whether DEP's denial of the permit constitutes a taking for which compensation is due is not before us, and we decline to comment on the merits of that issue, leaving it to be resolved in the circuit court. (citations omitted)
>
> Except as discussed herein, all motions are denied.

(App., p. 35) (emphasis added). Coastal filed a complaint for inverse condemnation in the Circuit Court of Leon County, Florida on January 16, 2001 on that single issue. At trial Charles Arnold, et al., and Robert W. Clark et al., intervened.[1]

As a defense at trial, the State claimed that paragraph 6 of the Settlement made the permitting requirement an **inherent limitation** in Coastal's Lease and therefore Coastal "has no interest compensable by inverse condemnation. *Lucas*

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[1] Charles Arnold and Robert Clark are representatives of a group of individuals (as listed at p. ii-iii) who hold a royalty on the lands covered by Lease 224-A and who intervened as parties to protect their royalty in the trial before the Circuit Court.

v. South Carolina Coastal Council, 505 U.S. 1003, 1027 (1992)." (Defendant DEP's Amended Motion to Dismiss Complaint at App., p. 18) The trial court denied the motion to dismiss and found the case to be ripe (App., p. 13), but based its decision and final judgment partly on this rationale which was reasserted by the State in its Answers:

> As a result of this 1976 agreement, Coastal assumed the risk that a drilling permit could be validly denied based upon future environmental permitting laws. **This condition inheres in and is a limitation upon Coastal's right** to explore for and produce oil on Lease 224-A.

(Trustees' Answer at App., p. 22) (emphasis added).

> All valid future permitting requirements by state environmental agencies thereby **became a background limitation on Coastal's interest** under the leases.

(DEP Answer at App., p. 25) (emphasis added).

During closing argument, the trial court raised *sua sponte* this Court's decision in *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002), for the proposition that temporary moratoriums do not result in takings.

> THE COURT: What happened to these cases that came out, Lake Tahoe and some of these other decisions that the U.S. Supreme Court -- . . ..
>
> MR. GAYLORD: Well, the most significant decisions . . . that speak to the issue that is before us here, Your Honor, are Lucas and Palazzolo.

* * * * *

THE COURT: Wasn't that Lake Tahoe?

MR. GAYLORD: That was a Supreme Court case, Your Honor. I don't think that has any application to this case.

THE COURT: It doesn't?

MR. GAYLORD: I don't believe it does, no.

THE COURT: Were there regulations?

MR. GAYLORD: . . . it was a temporary moratorium, Your Honor. It was a different situation than what we're dealing with here. All I can tell you is I don't think we cited that in our brief.

THE COURT: I know you didn't, but I just didn't know if you were familiar with it.

MR. GAYLORD: It's an issue involving temporary moratorium. So –

THE COURT: Total deprivation for a temporary period of time?

(App., p. 204-205) No evidence was presented at trial to support a finding that the policy here is temporary and Florida's policy was recognized as Governor Bush stated it:

> **Florida has long held that no oil or gas drilling should occur within 100 miles of Florida's coast.**

> **My position has been that there should be no such activity in the entire Eastern Gulf.**

(Plaintiff Exhibit 1402 at App., p. 181)(emphasis added).

The trial court ruled that there was no taking of Lease 224-A because the Lease established only a conditional right. That is, Coastal only had the right to drill if it could get a permit from the State to do so. Since the State had denied the permit, Coastal had no right that could be taken. Furthermore, the trial court ruled that the denial of one permit on a lease of 400,000 acres, was not a taking because even if current policy was to prohibit drilling, that policy might change in the future.

Coastal appealed the final judgment to the First District Court of Appeal and the parties briefed the issues of how this Court's decisions and federal takings law should be read and applied. On December 3, 2003, the appellate court issued a *per curiam* affirmed decision with no written opinion, precluding Coastal from seeking review in the Florida Supreme Court. That decision is published at 864 So. 2d 402 (Fla. 1st DCA 2004). Coastal filed a Motion for Clarification, Rehearing and Certification and Request for a Written Opinion and on January 9, 2004, the court denied that motion and request.

REASONS FOR GRANTING WRIT

This Court has repeatedly resisted the temptation to establish *per se* rules in regulatory takings law, yet that is exactly what the Circuit Court did in this case despite the specific warnings given by this Court. In finding no taking here, the Circuit Court found dispositive that there were predating regulations and that the destruction of all use was temporary. With those two findings, not only did the Circuit

Court specifically affect Coastal Petroleum Company (Coastal), but it has severely damaged both regulatory takings jurisprudence and property rights. If left unaddressed, it is a recipe for government to destroy property and bypass the constitutional requirement to pay compensation. While it may be tempting to the Court to see the end of the complex jurisprudence of regulatory takings, the Constitution and private property rights must not be pushed aside.

This case offers the Court the opportunity to further define regulatory takings law in a unique way. The property at issue in this case, Drilling Lease 224-A, has but one use, so the common quagmire of what other uses may or may not exist in a regulatory taking case is not present. In most cases "where an owner possess a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking." *Andrus v. Allard*, 444 U.S. 51, 65-66 (1979). The only question in this case is: whether the one "strand" that Coastal bargained for in its Lease has been denied?

This case invites further definition of areas addressed by this Court in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1027 (1992); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001) and *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002) as those precedents have been misapplied here.

This case presents the Court with the opportunity to speak to regulatory takings involving an interest that is less than a fee interest. It also involves a private interest covering public lands sold to Coastal by the State of Florida for a sole use that the State is now prohibiting, thereby destroying Coastal's property.

I. Permitting Regulations Cannot Be Considered Inherent Limitations On Title Altering The Character Of Property Though Ownership Never Changes.

Nearly every use of property today requires a permit or authorization of some sort from a government body. The Circuit Court in this case held that a permitting requirement became an inherent limitation and made the property conditional, so that the property owner does not have a right to use his land in a way until after a permit for that use has been granted. (App., p. 5, 10) Applying this rationale, if a property owner gets a permit he can use his property for that purpose, but if he does not get a permit, he never had the right to use the property in that way. Furthermore, if he does not get the permit he can't claim the right has been taken because he never had the right in the first place. Thus, a regulatory body will determine what proprietary rights a property owner has.

This is an extension of the sort of "Property rights are created by the State" type reasoning rejected by this Court in *Palazzolo v. Rhode Island*, 533 U.S. 606, 626 (2001), in addressing the rights of "post-enactment purchasers [to] challenge a regulation under the Takings Clause." In that case the Court recognized that while some government enactments are limiting but reasonable, others "are unreasonable and do not become less so through passage of time or title." *Id* at 627. While the *Palazzolo* case dealt with passage of title this case deals with the passage of time.

In *Palazzolo*, this Court described scenarios to show that considering predating regulations as inherent limitations on title was unfair and illogical. To apply that same rule to regulations where there has been no transfer of title further offends the notions of fairness and logic. The present case represents the next step toward the worst case scenario of

private property being useless until the government, at its discretion, allows you a use.

In the Settlement with the State of Florida, that was incorporated into a federal consent decree, Coastal agreed to "secure permits from all appropriate environmental protection agencies in compliance with the then existing laws and regulations, prior to any drilling or mining." (App., p. 174) As the language of the requirement itself recognizes, Coastal is not required to do anything more than any other person who wants to drill an oil well in Florida, it must get a permit in compliance with current laws. This requirement is clearly set out in the law. *See*, Section 377.24(1), F.S.. The only difference in this case is that Coastal expressly agreed to comply with the law. Applying the logic of the Circuit Court, a permitting requirement is an inherent limitation in title and therefore no one has the right to drill for oil regardless of whether they own a fee or something less, until the State permits it. If no one has the right to drill, then no one can complain of being deprived of such a right. The Constitution has been bypassed without any type of takings analysis.

In effect the decision below takes regulatory takings back to pre-*Mahon* status. In *Mahon* and since it has been recognized that the question is not whether the use is regulated, but whether the regulation of the use "goes too far." *Pennsylvania Coal v. Mahon*, 260 U.S. 393, 415 (1922). The necessary assumption is that the regulations were valid and the question is: whether the effect of the regulations deprives a property owner of all economically beneficial use of his land. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1030 (1992). The court below has ignored 80 years of precedent based upon a misapplication of this Court's recent decision in *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002).

The importance of an inherent limitation or a background limitation on title is that it determines whether a person ever had a right to use property in that way in the first place. *Lucas v. South Carolina Coastal Council*, 505 U.S. at 1027. Without a right to use the property to begin with there could never be a taking of that right, because there was never a right to be taken. The question of whether such a limitation exists is an "antecedent inquiry" into the determination of whether there has been a taking. *Id.* It is clear that the limitations discussed in *Lucas* are "restrictions that background principles of the State's law of property and nuisance already placed on land ownership. " *Id.*, at 1029. It is not at all clear that such limitations include all permitting regulations.

In *Lucas*, this Court addressed regulations that deny all economically beneficial use of land and found that:

> Any limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already placed upon land ownership.
>
> * * * * *
>
> When, however, a regulation that declares "off-limits" all economically productive or beneficial uses of land goes beyond what the relevant background principles would dictate, compensation must be paid to sustain it.

505 U.S. at 1029-1030. Nowhere in the "background limitations" exception to categorical takings that this Court set up does it allow new permitting regulations to take

property without compensation. The focus is on nuisance and common law remedies.

The Florida Supreme Court has already determined that the act of drilling for oil and gas is not a nuisance, *Watson v. Holland*, 20 So. 2d 388, 394 (Fla. 1945). The State of Florida also made that determination when it first issued the underlying leases in the 1940s and again in the 1976 Settlement by stating that the Lease was in the "best interest" of the State. (App., p. 164) The nuisance exception then does not preclude drilling from being a use Coastal received through Lease 224-A.

It is absurd to conclude that the one use sold to Coastal through Lease 224-A, was never really included in the interest Coastal got from the State to begin with. The right to explore for oil and gas is the only use Coastal received in that Lease. The question is: Can the State now use a permitting requirement as a background limitation to deny Coastal both the right to drill and compensation? In *Palazzolo* this Court determined that predating regulations were not limitations when there has been a transfer of title, at least not to the extent that a *per se* rule could be established. *Palazzolo*, at 630. The logical extension of that reasoning is that regulations could not become background limitations with the passage of time and no passage of title.

Of course Coastal is not claiming that the State cannot prevent drilling now because of the Lease it issued, but only that there is a cost associated with prohibiting drilling. The cost is the compensation to Coastal for that right which the State sold to Coastal and now seeks to prohibit.

Coastal recognizes that government "could hardly go on if to some extent values incident to property could not be

diminished without paying for every such change in the general law." *Mahon*, 260 U.S. at 413. However, "while property may be regulated to a certain extent, if a regulation goes too far it will be recognized as a taking." *Id.*, at 415. The question the Court can address in this case is: whether denying all use of property through a permit denial "goes too far" or is merely a determination that the right never existed in the first place when the property was acquired? That question has far reaching implications, beyond this case and beyond the State of Florida, and it should be addressed by this Court.

In *Lucas*, 505 U.S. at 1027 this Court wrote that:

> In the case of land, however, we think the notion pressed by the Council that title is somehow held subject to the 'implied limitation' that the State may subsequently eliminate all economically viable use is inconsistent with the historical compact recorded in the Takings Clause that has become part of our constitutional culture.

The same constitutional culture requires the protection of Leases from state machinations directed toward their destruction. The flawed logic of the Circuit Court would apply to Leases and fee simple property alike.

As a practical matter, to allow the State to critically alter "the nature of the property" by passage of time after enactment of permitting regulations creates a windfall for the State. *Palazzolo* at 627. In this case in particular, the windfall to the State is not just the annual rentals it continues to reap from Coastal while not allowing drilling, but the ability to exploit Coastal's prospects without Coastal and for a greater profit. As a requirement of the permitting process, Coastal was forced to divulge specific information of the

great potential for oil on its Lease and that information may now be used by the State after the Lease expires to extract a higher price for the right to drill in this area.[2] There is no windfall to Coastal if it is allowed to drill or receives compensation, because it would only be receiving the benefit for which it continues to pay.

The authoritative Oil & Gas Journal reports that Coastal believes that extensive amounts of oil could be extracted from its Lease.[3] Elsewhere off the Florida coast the United States government paid oil companies substantial sums to drop claims to leases that were acquired from the federal government in environmentally sensitive areas. *See* Anne Reifenberg, *U.S. to Pay Oil Companies $200 Million To Drop Claims to Some Offshore Leases*, The Wall Street J., Aug. 1, 1995.

At a time when our energy needs are rising to crisis levels and reaching harrowing costs, the potential value of the right to drill on Lease 224-A is enormous. That value is not only measured in monetary benefit to Coastal and the State of Florida, but in the benefits derived for the United States as a whole. The fight between property rights and environmentalists rarely affects the entire country in the way this controversy can and has. The NIMBY (Not In My Back

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[2] In one breath the State insists that there is no oil to be found on the Lease. In the next breath it seeks to impose sureties of first $515 million, then $1.9 billion, and finally $4.25 billion to cover the costs of clean up of some hypothetical million barrel spill and natural resource damage.

[3] "St. George Island prospect could hold 2.19 billion bbl in place. At 25% recovery, this would be a field of 618 million bbl ultimate recovery, requiring six platforms and 109 wells, Coastal said." Alan Petzet, *Coastal lists Smackover, Sunniland Objectives in Gulf Off Florida*, Oil & Gas J., Sept. 29, 1997, at 101. "Upside are possible tens of billions of produced oil...." Jamil Azad, *Apalachicola Embayment May Be Continent's Last Virgin Oil Basin*, Oil & Gas J., Feb. 8, 1999, at 71.

Yard) policies of the State are not only preventing the exploration and development of these valuable resources, but they are dismantling property rights and sidestepping the Constitution in the process. Environmental ends do not justify any means necessary to arrive at them.

II. Prohibitions On Use Cannot Be Used To Deny Use And Bypass The Constitutional Compensation Requirement When That Is Their Only Purpose.

Courts cannot be allowed to say that because a current prohibition may someday change that it is temporary and therefore not a taking. That is precisely what happened in this case without a shred of evidence to support it. This Court resisted the temptation to establish a *per se* rule that temporary deprivations of all use result in a regulatory taking and held that "the temporary nature of a land-use restriction . . . should not be given exclusive significance one way or the other." *Tahoe-Sierra,* at 535 U.S. at 337. Unfortunately, that decision has been read by the Circuit Court in this case as standing for the principle that so long as a total deprivation can be considered temporary it does not effect a taking. This gross distortion and misapplication of law must be corrected by this Court or it will it establish a "get out of compensation free" card to governments across the country.

While *per se* rules are obviously not favored by the Court in this area, if there ever was a limited way to put a ceiling on unreasonable government delay and obstruction, this is it. The differences between the *Tahoe-Sierra* case and this case demand a different result. First, unlike in *Tahoe-Sierra*, this case was not brought only under a categorical taking theory nor as a facial challenge. Coastal believes the case clearly qualifies for such treatment, but also alleged that there was a taking under the *ad hoc* type of analysis adopted

in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978), and which the Circuit Court purported to use.

There are also several critical factual differences. Coastal's right is not a fee simple interest whose value will simply be restored once a prohibition is over. It is a time limited lease and the time the prohibition is in place is time counted against the Lease that Coastal has lost forever. The Circuit Court's position on the Lease expiring was:

> I think there's a pretty well-known cliché about it ain't over until it's over. This lease is not over with just because this current administration has articulated a position of no -- they're against drilling within a hundred miles of the coastline.

(App., p. 194). If Coastal waits until the Lease expires to see if the State will ever let it drill, Coastal will have lost the right upon which it could have brought a takings claim. *See, Beluga Mining Co. v. Alaska Dept. of Natural Resources*, 973 P. 2d 570, 576 (Alaska 1999).

The State action is different as well, unlike in the *Tahoe-Sierra* case, here the State policy against drilling has no termination date and no evidence was presented to even suggest that it would end.[4] Nor is the purpose of the policy to preserve the status quo during formulation of a regulatory plan on how to best develop the area. In fact, while State rulemaking proceedings on offshore drilling had begun, after DEP's denial of Coastal's permit was affirmed, they were terminated as unnecessary: "the consensus . . . was that there was not a need to proceed with rule making. And that was

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[4] In fact, the State's case and the Court's position was that given the environmental movement Coastal should have known back in 1976 that it would not be able to get a permit. At trial no evidence was presented to show any sign of the environmental movement slowing.

the end of that." (App., pp. 198-200). The State recognizes there will be no drilling now.

The appellate decision affirmed by this Court in the *Tahoe-Sierra* case described a situation very similar to that in which Coastal currently finds itself. It stated that "were a temporary moratorium designed to be in force so long as to eliminate all present value of a property's future use we might be compelled to conclude that a categorical taking had occurred." *Tahoe-Sierra Preservation v. Tahoe Regional Planning Agency*, 216 F. 3d 764, 781 (9th Cir. 2000). That reasoning applies *a fortiori* where: Coastal holds an expiring lease for years; the prohibition is indefinite; and the prohibition is not merely a hiatus to maintain the status quo while formulating a regulatory structure. *See*, *Bass Enterprises Production Co. v. U.S.*, 133 F. 3d 893, 895-96 (Fed. Cir. 1998) (temporary taking found where all use of oil and gas lease was prohibited for a short time where the beginning and end of prohibition were statutorily set).

Delays in permitting are understandable and an accepted part of doing business, but delay and obstruction for the purpose of preventing the very use the government sold is not acceptable. The obligation of good faith is part of Lease 224-A as it is a part of every contract. That obligation precludes the State's policy-based utter refusal to grant a permit, just as it precludes the power of the State to sit and indulge in "extraordinary delay" in acting on a mining permit application, which was held to constitute a taking when the delay rendered plaintiff's leasehold interests valueless. *Eastern Minerals International, Inc. v. United States*, 36 Fed. Cl. 541, 549 (1996). *See also, Miller Brothers v. DNR*, 513 N.W. 2d 217 (Mich. App. 1994)(taking of oil lease where only use, drilling, was prohibited by environmental regulation)

This Court should not allow a State to renege on its contract only to be absolved of its action by its own courts. In *United States v. Winstar Corp.*, 518 U.S. 839 (1996), this Court refused to allow the United States to go back on its promise to count "supervisory good will" toward a bank's reserve requirements, thereby shutting it down. This Court noted "even though banking is one of the longest regulated and most closely supervised of public callings," the United States had to answer in damages when its shift in regulatory policy under FIRREA breached its contractual obligations. *Id.* 844 The Court relied on *United States Trust Co. v. New Jersey*, 431 U.S. 1 *(1977)*, 518 U.S. at 897, n. 41, noting that "a stricter level of scrutiny applies under the Contract Clause when a State alters its own contractual obligations." The Court stressed

> . . . that allowing the Government to avoid contractual liability merely by passing any 'regulatory statute,' would flaunt the general principal that, 'when the United States enters into contract relations, its rights and duties therein are governed by the law applicable to contracts between private individuals.' *Lynch v. United States*, 292 U.S. [571] at 579.

Id. at 895 (Breyer concurring).

In the present case, the Circuit Court recognized the State's policy and that it had been applied to deny Coastal's permit, but refused to consider the effect of the policy going forward. Instead the Court speculated that the policy may someday change and the State would allow drilling. Nothing but conjecture supported that speculation, and the State encouraged that conjecture:

> MR. MARZULLA: ... If this country goes to war with Iraq, if there's a substantial disruption, who

knows what changes might occur?

> THE COURT: I think that's the --- one of the most critical issues in this case is that current policy of the State of Florida to deny a permit for environmental reasons is going to be a permanent position or did it change when our current governor's brother may invade Iraq? In other words, conditions change. They may very well be drilling in the Gulf of Mexico. White beaches may not be very important to the people of this state....

(App., p. 190) The trial judge started with this premise:

> THE COURT: But then-existing laws may be different if one governor gets elected or another governor.... But this denial of a permit doesn't mean that if Coastal applied -- if Mr. McBride won the election or if President Bush invaded Iraq tomorrow that they couldn't apply again and might be granted the permit.

(App., p. 187-188). During the trial he found the issue that someday the policy might change very relevant:

> THE COURT: ... And I think what may happen in the future is likewise something that the Court should take into consideration. The likelihood of obtaining oil out there may not be very great right now, but if the need for oil was much greater, then I suspect the State of Florida would be encouraging again the drilling of oil to see whatever can be found. ....

(App., p. 203).

The trial judge required Coastal to prove that no change in the policy would ever occur to prove the effect of

the policy was a taking:

> THE COURT: But you have to assume that for the purpose of your theory here that the environmental concerns will always be the same as they are now, they will override the State's desire to have oil produced there forever. Therefore, you've lost all potential use of the property.
>
> MR. GAYLORD: That's correct, all economically viable use, Your Honor.
>
> THE COURT: Regardless of what may take place in Iraq tomorrow or Iran or Saudi Arabia or any of the oil-producing countries where we may be greatly curtailed in our supply of oil and there will be a big need to explore out here in the Gulf, you still have to assume that environmental concerns will always override.

(App., p. 206).

There will always be a scenario a state court or government agency could dream up that may result in a prohibition ending. If that is all that is required to preclude the finding of a regulatory taking, regulatory takings will be the number one endangered species. Such conjecture and speculation in a taking case flies in the face of the ripeness doctrine established by this Court. That doctrine frees property owners from having to act with futility in order to satisfy procedural requirements in the face of such clear and adamant opposition to the use of their property.

There was no need to speculate at all in this case because the trial judge determined the case was ripe since "a final agency decision has been made." (App., p. 14)

Therefore "the extent of permitted development" was known, "to a reasonable degree of certainty." *Palazzolo*, at 620. This Court developed the threshold requirement that a taking claim be ripe before it will be heard in order to assure that a court is not required to speculate about facts, *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985), and to prevent the trial court from making decisions in the abstract. *City of Riviera v. Shillingburg*, 659 So. 2d 1174, 1181 (Fla. 4th DCA 1995) (the court "may not engage in speculation"). The denial of this permit is final agency action regarding how the State would apply its policy to all of Lease 224-A.

Here the court determined the case to be ripe and then limited evidence of the "past history" that clearly showed the State had reached its final decision as to whether it would allow drilling. Finally, the court decided that this was only one permit denial on a large lease and therefore there was no taking. The future effect of the policy was ignored despite the acknowledgement of its existence and application by the State to Lease 224-A to deny Coastal the right to use its Lease in the only way it could be used.

Florida's actions resulted in a categorical taking of Lease 224-A, but under the *ad hoc* test, they have also destroyed Coastal's "investment-backed expectations." *See Penn Central Corp. v. City of New York*, 438 U.S. at 124. Lease 224-A, and the Settlement incorporated into the federal consent decree were ordinary bilateral contracts, supported by consideration and fully enforceable as executory agreements. The federal consent decree and Settlement explicitly contemplated a 40-year base period for the leasehold obligation, which Coastal could, and did, keep fully alive by making specified annual rental payments pocketed by the State. The whole point of the 1976 agreement was to stabilize the expectations of both Florida and Coastal with

respect to their future dealings. It is dangerous to now allow the State to unilaterally eliminate its obligations under the agreement without compensation for the property interest it thereby destroys. Looking backward, it allows the State to destroy the Lease. Going forward that position senselessly blocks the State from allowing drilling. Parties that have paid for their legal interests have, and should have, a reasonable expectation that these will receive constitutional protection.

While the Court has avoided *per se* rules in regulatory takings cases, there must be limits outside which government actions are so clearly efforts to skirt the Constitution and affect property, that they will be considered takings. Repeated and sustained actions denying drilling on a Lease the State sold to Coastal for the sole use of drilling is a taking. No amount of conjecture or speculation excuses the duty of the State to pay compensation. The Circuit Court's decision can affect every piece of property subject to regulation; it invites governments to engage in hypotheticals; and it allows courts to speculate in addressing regulatory takings.

Coastal has a protected real property Lease that Florida wishes to take without compensation. Florida justifies its actions by establishing a policy that allows it to destroy recognized property interests without compensation, and to repudiate its own grants in bad faith after the fact, and then offers before its own courts self-serving justifications for the destruction of these interests without compensation. The Constitution forbids Florida's effort.

Petitioners respectfully request this Court to accept the unique opportunity this case presents to further regulatory takings jurisprudence by clarifying the law on critical issues, without the restrictions and caveats the normal myriad of factual "use" questions present.

CONCLUSION

Certiorari should be granted to review the judgment of the First District Court of Appeal, State of Florida in *Coastal Petroleum Company v. State of Florida, et al.*, 864 So. 2d 402 (Fla. 1st DCA 2003).

Respectfully submitted,

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April 7, 2004

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COASTAL PETROLEUM COMPANY, a Florida corporation, Appellant,

v.

STATE OF FLORIDA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, and THE BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT TRUST FUND, Appellees.

Case No. 1D02-4712.

District Court of Appeal of Florida, First District.

Opinion filed December 3, 2003.

An appeal from the Circuit Court for Leon County, Judge L. Ralph Smith.

S. Cary Gaylord, Tampa; Robert J. Angerer, Tallahassee; M. Stephen Turner, Tallahassee; Susan W. Fox and Charles W. Pittman, of MacFarlane Ferguson & McMullen, Tampa, for Appellant.

Charles J. Crist, Jr., Attorney General, Robert I. Scanlan, Assistant Attorney General, Tallahassee; Parker Thomson, of Hogan & Hartson; Roger J. Marzulla, of Marzulla & Marzulla, Washington, D.C.; L. Linton Morgan, of Breazeale, Sachse & Wilson, Mandeville, LA; Teri L. Donaldson, John W. Costigan, Andrew J. Baumann, and Maureen Malvern, Office of General Counsel, Tallahassee;, for Appellees.

PER CURIAM.

AFFIRMED.

BARFIELD, ALLEN, and DAVIS, JJ., CONCUR.

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT IN AND FOR THE LEON COUNTY, FLORIDA

CASE NO. 01-101

COASTAL PETROLEUM COMPANY, a Florida Corporation,

Plaintiff,

v.

STATE OF FLORIDA, DEPARTMENT OF ENVIRONMENTAL PROTECTION; and BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT TRUST FUND,

Defendants.

FINAL JUDGMENT

This action was tried before the court from September 30, 2002 to October 8, 2002, on the inverse condemnation complaint of the Plaintiff, Coastal Petroleum Company (Coastal) against Defendants, State of Florida, Department of Environmental Protection (the "Department") and Board of Trustees of the Internal Improvement Trust Fund (the "Trustees"). Plaintiff alleged that as a result of the Department's denial of Coastal's application for Drilling Permit 1281 its 400,000 acre Drilling Lease No. 224-A, as modified ("Lease 224A") had been taken without the payment of compensation required by Article X, Section 6, of the Florida Constitution.

Based on the prior decisions of the First District

Court of Appeal in *Coastal Petroleum Company v. Chiles*, 656 So. 2d 284 (Fla. 1st DCA 1995), *Coastal Petroleum Company v. Chiles*, 701 So. 2d 619 (Fla. 1st DCA 1997), and *Coastal Petroleum Company v. Florida Wildlife Federation, Inc.*, 766 So. 2d 226 (Fla. 1st DCA 2000), the task of this Court was to hold an evidentiary hearing to determine the nature of the Plaintiff's property interest, the extent of Defendants' interference with that property interest, and whether the facts of the case, taken as a whole, constitute a taking. In particular, the Court was to consider the circumstances surrounding the execution of the 1976 Memorandum of Settlement between Coastal and the Trustees in the case styled *Coastal Petroleum Company v. Secretary of the Army,* and the expectations of the parties at the time they entered into the settlement. Having heard seven days of testimony, considered the substantial documentary evidence of over 200 exhibits, and weighed the credibility of the witnesses, the Court makes the following findings of facts and conclusions of law:

Findings of Fact

1. Coastal and the Trustees entered into Drilling Lease 224A, as modified, on February 27, 1947. Lease 224A gave Coastal the exclusive right to explore for and produce oil and gas from the sovereignty lands in the Gulf of Mexico within three leagues (10.36 miles) of the coast of Florida, extending from Franklin County into Pasco County. Under the terms of the lease and controlling statutory requirements, Coastal had an obligation to engage in certain drilling operations to explore for oil and gas in order to maintain the validity of the lease.

2. Lease 224A was amended, limited, and modified by the January 6, 1976, Memorandum of Settlement between Coastal and the Trustees, later incorporated into a Consent Decree, which resolved the case

styled *Coastal Petroleum Company v. Secretary of the Army*. The principal issues in the *Secretary of the Army* litigation were: 1) Coastal's claim that it was entitled to receive a permit from the federal permitting agency to mine in Lake Okeechobee and was not obligated to obtain permits from any state agency; 2) Coastal's claims for damages for inverse condemnation and conversion; and 3) the Trustees' challenge to the validity of the leases based on Coastal's failure to drill the number and depth of wells imposed by the lease and controlling statutory provisions.

3. The federal court determined the inverse condemnation and most other issues adversely to Coastal, but declared the leases valid. The Trustees appealed to the Fifth Circuit, which certified state law questions concerning the leases' validity to the Florida Supreme Court.

4. At the time of the 1975 negotiations which led to the 1976 Memorandum of Settlement, the issue of the validity of Coastal's leases had been argued and submitted to the Florida Supreme Court. During the negotiations the parties several times requested that the Florida Supreme Court withhold issuance of an opinion while they endeavored to reach a settlement. Both parties were uncertain as to how the Florida Supreme Court would rule. The parties negotiated the settlement with each side assessing the chances of winning or losing as a 50/50 proposition. As a result of this assessment, both parties were motivated to negotiate a settlement.

5. The negotiated Memorandum of Settlement contains the following provision in paragraph 6 of the "surrender of rights' section:

> Coastal shall secure permits from all appropriate State environmental protection agencies in compliance with the then existing laws and regulations, prior to any drilling or mining.

This provision is of particular importance to the issues presented in this case.

6. The Court finds, based upon the testimony of the negotiators as well as the documentary evidence, that Paragraph 6 of the Memorandum of Settlement was intended to ensure that Coastal's right to drill for oil and gas would be a conditional right, so that it would only possess a right to drill for and take oil and gas if it could obtain state permits to do so under the then existing laws, and would only be able to obtain such permits if it could satisfy environmental concerns.

7. Based upon the testimony of the negotiators as well as the documentary evidence, the Court specifically rejects Coastal's contention that Paragraph 6 adds nothing to the Memorandum of Settlement and that it is mere boilerplate to the effect that Coastal must comply with the law like everyone else.

8. The Court finds that its interpretation of the effect and intent of Paragraph 6 is reasonable based upon the following findings concerning the circumstances surrounding the negotiation of the 1976 Memorandum of Settlement:

a. Both parties negotiated in good faith but negotiated with different objectives in mind. In negotiating the settlement, the parties did not intend that Coastal surrender or be denied its exclusive right to explore for and drill for oil and gas on Lease 224A.

b. Over the course of the 30 years Coastal owned the leases it experienced difficulty in meeting its drilling obligations as evidenced by the Trustees' allegations in the *Secretary of Army* case. At the time of the settlement agreement, Coastal was incapable of drilling oil and gas wells on its own because it had virtually no income and was experiencing serious financial difficulties. Coastal would also have difficulty in keeping its existing partner or

finding new partners to meet drilling obligations because of recent exploration failures in adjacent federal waters and adjacent uplands, as well as the dry holes drilled on its own leases.

c. If the Trustees had won the *Secretary of Army* case, Coastal would have lost the lease. If Coastal had won, Coastal would have retained the leases, but also retained the burden of meeting the lease's rigorous drilling obligations. Given the existing financial circumstances of Coastal, Coastal would then likely have lost the lease anyway due to its inability to comply with drilling obligations. The objective of Coastal was to retain the lease, but get out of the financially onerous drilling obligations. In the Memorandum of Settlement, the Trustees agreed to waive any drilling obligations set forth in the lease. The provision waiving the drilling obligations also benefitted the State, since there would be no obligatory oil or gas drilling on State owned submerged lands, but it benefitted Coastal more.

d. On the other hand, the Trustees' objectives focused on environmental concerns. During the late 1960's and through all of Governor Askew's administration, the State of Florida was undergoing a change in philosophy concerning environmental matters. Constitutional, statutory, and regulatory provisions were changing. At the urging of Governor Askew, the State of Florida was very much concerned with environmental factors in protecting the properties of the State for the citizens of State of Florida. This concern did not relate only to oil and gas exploration. It related to mining of minerals and to the dredging and filling of submerged lands of the State. Coastal was well aware of these dramatic changes.

e. The primary objective of the State in pressing for the provisions of what became Paragraph 6 of the Memorandum of Settlement was to ensure that any future activities on Coastal's leases would have to comply with all

state environmental requirements applicable at the time of the activity and that unless Coastal could obtain state permits in compliance with these environmental requirements that it would have no right to drill on state owned submerged lands.

f. The placement of Paragraph 6 in the "surrender of rights" section of the Memorandum of Settlement was the decision of Coastal's counsel. The paragraph represents a surrender of Coastal's arguable claim, made prior to and during the *Secretary of Army* litigation, that it had the right to drill for oil and gas without applying for state permits since its right to explore for and produce oil, gas and other minerals was fixed by the 1947 lease and could not be altered by subsequently enacted rules or legislation.

g. Coastal's opinion was that its post-settlement position was preferable to its pre-settlement position. The leases were no longer subject to the onerous obligatory oil drilling requirements, Coastal retained the exclusive conditional right to drill for and produce oil and gas on more than 800,000 offshore acres and 450,000 acres underlying Lake Okeechobee, Coastal obtained a royalty interest on 2.3 million acres of lands which had formerly been under the lease, which produced the potential for future rewards without cost, and its lease interests served as the basis for extensive phosphate conversion claims that were subsequently brought against various phosphate companies shortly after the signing of the Memorandum of Settlement.

9. The Court finds that Coastal had no reasonable expectation that it could drill for oil without a permit on Lease 224A, and no reasonable expectation that the State could not deny such a permit based upon the then existing law.

10. The Court finds that Coastal has failed to prove by the greater weight of the evidence that the value of the lease was less after the 1998 permit denial than it was before that denial. Therefore, the Court finds that there has been no diminution in value of Lease 224A as a result of the

denial of Permit 1281.

11. Since the time of the 1976 Memorandum of Settlement, Coastal has been unable to find any company willing to make the substantial investment necessary to explore the lease. The Court finds credible the expert testimony this Court elicited from Mr. Bunch that there is insufficient available data to determine if there is a drillable oil and gas prospect at the location of the site of Permit 1281, and further, that no oil and gas company would spend money to partner the drilling of a well at this location.

12. The evidence presented at the trial on this matter suggests that there has been a change in the manner in which the Department applies the law and interpreted the provisions of Section 377.241, Florida Statutes, up to the time that Permit 1281 was denied in 1998. In affirming the denial of the application for Permit 1281, the District Court of Appeal made a specific finding that the Department had the right to change its mind about how to interpret the provisions of the oil and gas permit statute, that its new interpretation stressing environmental concerns was valid, and that the application for Permit 1281 was properly denied based upon a weighing of the statutory criteria after factoring in these environmental concerns. This valid interpretation of the permitting statute constitutes "then-existing law" as that phrase is used in Paragraph 6 of the Memorandum of Settlement.

13. The Court finds that Coastal has not been denied all of its economically beneficial use of its property and that the denial of an application to drill on one location within a 400,000 acre lease does not constitute a taking.

14. The Court further finds that the denial of Permit 1281 did not curtail any *reasonable* investment backed expectations that Coastal had of drilling, exploring, and producing oil or gas from the lease because it does not appear to the Court, based upon the Court's evaluation of the evidence and the credibility of the witnesses, that Coastal

cannot have reasonably held such expectations.

15. It appears from the evidence presented to this Court that the Department could properly have denied a permit to drill based upon lack of proof on the statutory factor which requires an analysis of the indicated likelihood of the presence of oil or gas or related minerals in such quantities as to warrant exploration and extraction of such products on a commercially profitable basis.

16. In the permitting proceeding, the Department did not make its determination on this "commercial prospectiveness" factor based upon the evidence presented at this trial. If the same evidence presented to this Court had been presented on the application for a permit, the permit would properly be denied based upon a failure of proof on that one factor alone.

17. In refusing to allow Coastal to drill on Lease 224A, the State has exercised a contractual right under Paragraph 6 of the Memorandum of Settlement, and has not exercised the sovereign power of eminent domain.

Conclusions of Law

Based upon the above findings and the many facts in the record which provide additional credible support for these findings, it is the opinion of this Court that the Plaintiff has not established by the greater weight of the evidence that there has been a taking of Lease 224A.

The legal framework for analyzing this case is set forth in *Coastal Petroleum Company v. Chiles*, 701 So. 2d 619, 623-24 (Fla. 1st DCA 1997):

> In determining whether a property owner has a right to recover damages pursuant to an action for inverse condemnation based on an enactment of a governmental regulation, it is necessary to determine (1) the nature and

> extent of the property interest held by the plaintiff; (2) whether that property interest is one which will entitle the landowner to protection pursuant to the laws of inverse condemnation; (3) the extent that the government's regulation interferes with the plaintiff's enjoyment of the protected property right; and (4) whether the governmental regulation effects a taking of property pursuant to the dictates of *Graham v. Estuary Properties*, 399 So.2d 1374 (Fla. 1981).

(Citation added.)

Here, Coastal's sole property interest is defined in black and white by the terms of Lease 224A as that lease was amended by the 1976 Memorandum of Settlement. Coastal agreed in Paragraph 6 of the Memorandum of Settlement that its right to drill for oil and gas under the lease would be conditioned upon its ability to secure environmental permits under the then existing laws. Since Permit 1281 was validly denied, Coastal has no present right to drill which would be protected by the laws of inverse condemnation. The State has not interfered with Coastal's property interest by denying Permit 1281, it has merely exercised it's contractual right to insist that Coastal secure permits under the then existing environmental laws prior to having the right to explore for and produce oil and gas from Lease 224A.

Further, Coastal has failed to meet any of the six criteria set forth in *Graham v. Estuary Properties*:

1. *Whether there is a physical invasion of the property.* This case does not involve an allegation of a physical trespass of Coastal's property.

2. *The degree to which there is a diminution in value of the property. Or stated another way, whether the regulation precludes all economically reasonable use of the*

property. The evidence shows no diminution in value in the lease as a result of this denial of one permit application on a 400,000 acre lease.

3. *Whether the regulation confers a public benefit or prevents a public harm.* The balancing test set forth in Section 377.241, Florida Statutes, for issuance of a permit to drill for oil or gas, balances the applicant's interests with the interest of the State in preventing the public harm of the pollution of Florida's waters and beaches and protection of the State's marine environment.

4. *Whether the regulation promotes the health, safety, welfare, or morals of the public.* The balancing test in Section 377.241, Florida Statutes, which requires consideration of the environmental consequences of oil and gas drilling promotes the health, safety and welfare of the public.

5. *Whether the regulation is arbitrarily and capriciously applied.* In affirming the final order denying Coastal's permit application, the First District Court of Appeal held the denial was a valid application of Section 377.24, Florida Statutes.

6. *The extent to which the regulation curtails investment-backed expectations.* Coastal's post-settlement agreement expectations could only reasonably be that it could drill only if it received a permit, and that such a permit might in fact be denied. Therefore, DEP's denial of Permit 1281 does not frustrate any reasonable expectation of Coastal's. Further, as set forth above, Coastal's expectation of drilling for and producing oil and gas was not reasonable based upon the lack of proof on the statutory factor of "commercial prospectiveness" at the site of Permit 1281.

IT IS ADJUDGED that Plaintiff, Coastal Petroleum Company take nothing by this action. Defendants, State of Florida, Department of Environmental Protection, and the Board of Trustees of the Internal Improvement Trust Fund, shall be awarded costs upon appropriate motion and order.

ORDERED and ADJUDGED at Tallahassee, Leon County, Florida, on the _____ day of October, 2002.

/s/_____
L. RALPH SMITH, JR.
Circuit Judge

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IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT IN AND FOR LEON COUNTY, FLORIDA

CASE NO.: 01-101

COASTAL PETROLEUM COMPANY,

Plaintiff,

vs.

STATE OF FLORIDA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, and BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT FUND,

Defendants.

ORDER GRANTING MOTION TO STRIKE and JOINT MOTION FOR PROTECTIVE ORDER

THIS CAUSE came before the Court upon the Defendant's Motion to Strike several paragraphs from Plaintiff's complaint. Having considered the complaint, motions, memoranda and relevant case law, the court finds as follows:

Plaintiff has filed a complaint alleging that the denial of a drilling permit constitutes a taking of its property. Both Plaintiff and Defendants agree that the permit denial constitutes final agency action sufficient to vest this Court with jurisdiction pursuant to sections 253.763 and 403.90, Florida Statutes. The parties also agree, based upon a finding by the First District Court of Appeal, the permit denial was proper.

Defendants have argued that by including paragraphs 6, 18-19, 24-32, 34-62, 64-65, 67-71, 74-75, and 82-86, in its complaint, Plaintiff is attempting to reargue the propriety of the permit denial. The rationale for the underlying decision is irrelevant to the determination of whether a taking has occurred. *See, Manatee County v. Estech General Chemicals Corp.*, 402 So. 2d 75 (Fla. 2d DCA 1981). Thus, striking the objectionable paragraphs is proper.

Plaintiff argues that these allegations are necessary to establish the futility of any future permit applications. While the past conduct of the Agency could be relevant to a determination of futility, Plaintiff is not required to establish futility to state a cause of action. *See, Devon Energy Corp. v. United States*, 45 Fed. Cl. 519 (1999), *South Florida Blood Bank, Inc. v. Futch*, 764 So. 2d 724 (Fla. 4th DCA 2000). Futility is an exception to the ripeness doctrine when a plaintiff has not received a "final" decision. *See, Gardens Country Club v. Palm Beach County*, 712 So. 2d 398 (Fla. 4th DCA 1998). Once there has been final agency action, a party may proceed directly to circuit court. *See, Bowen v. Florida Department of Environmental Regulation*, 448 So. 2d 566 (Fla. 2d DCA 1984).

Based upon the parties agreement that a final agency decision has been made, the action is ripe and the objectionable paragraphs are unnecessary to establish standing and should be stricken.

The Court further finds that discovery of facts related to the objectionable allegations are outside the scope of allowable discovery in this case.

IT IS THEREFORE ORDERED and ADJUDGED as follows:

1. Defendants' Motion to Strike is hereby GRANTED.
2. Defendants' Motion for Protective Order is hereby GRANTED.
3. Plaintiff may file a Motion to Amend the Complaint to allege facts material and relevant to the issues of ripeness and futility within 20 days of the date this Order is entered.
4. Discovery is hereby STAYED pending a ruling on any Motion filed by Plaintiff in accordance herewith.

DONE AND ORDERED this 19th day of September, 2001.

_____/s/_____
L. RALPH SMITH, JR.
Circuit Judge

Copies to all counsel of record

DISTRICT COURT OF APPEAL OF FLORIDA, FIRST DISTRICT
Tallahassee, Florida 32399-1850
Telephone No. (850) 488-6151

January 9, 2004

Case No. 1D02-4712
L.T. No.: 01-101

Coastal Petroleum Co., a Florida corporation,	State Of Florida, Dept. Of Environmental Etc.etal, v.
Appellant/Petitioner(s),	Appellee/Respondent(s).

BY ORDER OF THE COURT:

Appellant's motion filed December 18, 2003, for clarification, rehearing, certification and request for written opinion is denied.

I HEREBY CERTIFY that the foregoing is (a true copy of) the original court order.

Served:

Lorena Hart Ludovici	Parker D. Thomson
R. Adam Carnegie	Gino Luzietti
M. Stephen Turner	Charles S. Stratton
Monica Reimer, A.A.G.	Susan W. Fox
Roger J. Marzulla	Robert J. Angerer, Jr
L. Linton Morgan	Robert I. Scanlan, A.A.G.
Robert J. Angerer, Sr.	Teri L. Donaldson
S. Cary Gaylord	Maureen Malvern
Charles W. Pittman	Jonathon Glogau, A.A.G.

jm

_____/s/_____ seal
JON S. WHEELER, CLERK

377.241 Criteria for issuance of permits. —

The division, in the exercise of its authority to issue permits as hereinafter provided, shall give consideration to and be guided by the following criteria:

(1) The nature, character and location of the lands involved; whether rural, such as farms, groves, or ranches, or urban property vacant or presently developed for residential or business purposes or are in such a location or of such a nature as to make such improvements and developments a probability in the near future.

(2) The nature, type and extent of ownership of the applicant, including such matters as the length of time the applicant has owned the rights claimed without having performed any of the exploratory operations so granted or authorized.

(3) The proven or indicated likelihood of the presence of oil, gas or related minerals in such quantities as to warrant the exploration and extraction of such products on a commercially profitable basis.

History. — s. 1, ch. 61-299; ss. 25, 35, ch. 69-106.

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT IN AND FOR LEON COUNTY, FLORIDA

CASE NO.: 01-101

COASTAL PETROLEUM COMPANY,

Plaintiff,

vs.

STATE OF FLORIDA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, and BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT FUND,

Defendants.

DEFENDANT DEP'S AMENDED MOTION TO DISMISS COMPLAINT

* * * * *

FAILURE TO STATE CLAIM: NO PROPERTY INTEREST COMPENSABLE BY INVERSE CONDEMNATION

* * * * *

The complaint should be dismissed because it fails to allege a property interest compensable by inverse condemnation. In determining whether a complaint states a taking claim, the "logically antecedent inquiry" is whether the restriction complained of inheres in plaintiff's property interest. If so, plaintiff has no interest compensable by inverse condemnation. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1027 (1992); *Coastal Petroleum v.*

Chiles, 701 So. 2d 619, 623 (Fla. 1st DCA 1997) (focusing on "the nature and extent" of the plaintiff's property interest in denying a taking claim). Not every property interest recognized by law is compensable in an inverse condemnation proceeding. *Corn v. City of Lauderdale Lakes*, 95 F.3d 1066, 1074, 1075 (11th Cir. 1996) (stating "property" as used in Just Compensation Clause is defined much more narrowly than in Due Process Clause).

In addition to the reasons given in the Trustees' motion, Coastal's interest is insufficient for a taking claim because it was granted subject to the very restrictions now claimed to be a "taking" of plaintiff's property. A right granted subject to discretionary limitations by the government is not compensable in inverse condemnation. *See Democratic Central Committee v. Washington Metropolitan Area Transit Comm'n*, 38 F.3d 603, 608 (D.C. Cir. 1994) (holding rights created by a court-approved settlement agreement were not compensable because the court retained discretionary control). When a governmental entity acts to create property rights, but retains the power to alter those rights, exercise of the retained power is not a "taking" for purposes of the Fifth amendment. *Id.* At 606; *see also* Glenn P. Sugameli, *Lucas v. South Carolina Coastal Council: The Categorical and Other "Exceptions" to Liability for Fifth Amendment Takings of Private Property Far Outweigh the "Rule,"* 29 Envtl. L. 939, 945 (1999) (no taking if restriction is inherent in title to property).

* * * * *

Respectfully submitted this 12 day of April, 2001.

_____/s/_____

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IN THE CIRCUIT COURT FOR THE SECOND JUDICIAL CIRCUIT IN AND FOR LEON COUNTY, FLORIDA

COASTAL PETROLEUM COMPANY,

Plaintiff,

vs.

STATE OF FLORIDA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, and BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT TRUST FUND,

Defendants.

CASE NO. 01-101

BOARD OF TRUSTEES' ANSWER AND AFFIRMATIVE DEFENSES

* * * * *

AFFIRMATIVE DEFENSES

* * * * *

AFFIRMATIVE DEFENSE V:
Compromise and Settlement

In the case styled *Coastal Petroleum Co. v. Secretary of the Army*, Case Nos. 68-951-CA and 69-699 Div.-CA (consolidated), U.S. District Court of the Southern District of Florida, there was a dispute between the Trustees and Coastal as to the validity of Coastal's drilling leases and the nature and extent of the parties' obligations under those

leases. In 1976, Coastal and the Trustees entered into a Memorandum of Settlement which evidences those parties' mutual intent to effect a settlement of the dispute by a superceding agreement. The Trustees recognized the validity of Coastal's right to drill for and produce oil on the leases' reduced working interest areas as described in the 1976 agreement, and in return Coastal agreed, among other things, that it could exercise its right to explore for and produce oil only after securing permits from all State environmental protection agencies in compliance with the then existing laws and regulations. Memorandum of Settlement, ¶6 [A copy of the 1976 Memorandum of Settlement is attached as Exhibit A]. As a result of this 1976 agreement, Coastal assumed the risk that a drilling permit could be validly denied based upon future environmental permitting laws. This condition inheres in and is a limitation upon Coastal's right to explore for and produce oil on Lease 224-A. The First District has found that Coastal's drilling permit was properly and validly denied by DEP, a state environmental permitting agency, under the then existing laws controlling issuance of such permits. Coastal has no right to drill for oil on Lease 224-A which can be taken, because it does not have the permit which it agreed to obtain pursuant to the 1976 Memorandum of Settlement. Further, Coastal's claim that it has an absolute right to drill for and produce oil which has been taken is barred by the Memorandum of Settlement, because Coastal's alleged right to drill without obtaining permits from State environmental agencies was extinguished by the 1976 agreement.

RESPECTFULLY SUBMITTED this 21st day of May, 2001.

ROBERT A. BUTTERWORTH
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COASTAL PETROLEUM CO.,

Plaintiff,

vs.

FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION and BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT TRUST FUND OF THE STATE OF FLORIDA,

Defendants.

CASE NO. 01-101

ANSWER AND AFFIRMATIVE DEFENSES OF FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION

* * * * *

AFFIRMATIVE DEFENSES

* * * * *

Compromise and Settlement

The 1976 Settlement Agreement between Coastal and the Trustees, here attached, resolved litigation between Coastal and the Trustees regarding the validity of Coastal's leases. In return for the Trustees' acceptance of the validity of Coastal's three drilling leases and the Trustees' concession that 1941 law would govern the number of wells required to

be drilled under the leases, Coastal and its privies agreed to reduce the area covered by the leases and to be bound by all future permitting requirements imposed by state environmental agencies. All valid future permitting requirements by state environmental agencies thereby became a background limitation on Coastal's interest under the leases. Coastal assumed the risk that future permits might be denied. Under the settlement agreement, obtaining an environmental permit became a specific and express condition precedent for exercise of Coastal's contractual right to drill under the three leases. Since Coastal agreed that its right to drill would be contingent on future environmentally permitting requirements, no property interest was taken from it by DEP's denial of a permit.

RESPECTFULLY SUBMITTED this 21st day of May, 2001.

/s/

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IN THE FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

CASE NO.:1DO2-4712

COASTAL PETROLEUM COMPANY,
a Florida corporation,

Appellant/Cross Appellee,

CHARLES E. ARNOLD, et al., and
ROBERT W. CLARK, et al.,

Appellants/Cross-Appellants

vs.

STATE OF FLORIDA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, and BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT TRUST FUND,

Appellees.

INITIAL BRIEF OF APPELLANT
COASTAL PETROLEUM COMPANY

* * * * *

POINT II

THE TRIAL JUDGE ERRED IN HOLDING THAT LEASE 224-A WAS NOT TAKEN

* * * * *

C. THIS COURT MAY PROPERLY DECLARE THAT LEASE 224-A WAS TAKEN AND RETURN THE CASE FOR A JURY TRIAL ON THE ISSUE OF VALUATION.

Government action may be found to be a regulatory taking either as a categorical taking or through an ad hoc factual analysis. A categorical taking requires "compensation without the usual case-specific inquiry ... where the regulation 'denies all economically beneficial or productive use of land.' " *Keshbro, Inc. v. City of Miami*, 801 So. 2d 864, 869 (Fla. 2001) (quoting *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992)). Where a categorical taking does not exist, the court may find a taking through an ad hoc factual analysis considering a number of factors. *See, Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978) and *Graham v. Estuary Properties, Inc.*, 399 So. 2d 1374 (Fla. 1981) *cert. den., Taylor v. Graham*, 454 U.S. 1083 (1981). The record before this Court establishes both types of takings and the Court should declare the denial and application of the policy was a taking of Lease 224-A.

* * * * *

Respectfully Submitted,

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IN THE FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

CASE NO.:1DO2-4712

COASTAL PETROLEUM COMPANY,
a Florida corporation,

Appellant/Cross Appellee,

CHARLES E. ARNOLD, et al., and
ROBERT W. CLARK, et al.,

Appellants/Cross-Appellants

vs.

STATE OF FLORIDA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, and BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT TRUST FUND,

Appellees.

REPLY BRIEF OF APPELLANT
COASTAL PETROLEUM COMPANY

* * * * *

C. THE TRIAL JUDGE ERRED IN FAILING TO CONCLUDE LEASE 224-A IS COMPENSABLE PROPERTY.

The State fails to cite a single case justifying denial of a proprietary right without compensation because of a regulatory permitting requirement. There is no pre-existing limitation on Coastal's lease making it conditional or

noncompensable property. Though Coastal thought the 1976 MOS was reasonable, that was as Coastal read and understood it, not as it is now being construed and contorted. The State's pre-existing limitation argument is based upon *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1029 (1992), where the right to prohibit nuisances was found to be a pre-existing limitation. Coastal's exploration and production right is not a nuisance and no one asserts it is.

No State case addresses permit denials, or removal of constitutional protection based on permit denials, or holds that a permitting requirement is a pre-existing limitation.

* * * * *

The State also cites cases on federal drilling leases. Federal drilling leases contain completely different contractual provisions from Lease 224-A, are tied to a very specific statutory structure and do not confer a right as great as Coastal's. *Secretary of the Interior v. California*, 464 U.S. 312, 339-340 (1984). For instance, on a federal lease, an exploration or production plan **must** be denied if it would probably cause serious harm to the environment, after which lease may be canceled, **entitling the lessee to compensation**. *Id.*, at 339. Coastal presented evidence of the federal government buying back drilling leases that were thwarted for environmental reasons, but the trial judge dismissed those rights, saying: "It may be evidence of a great waste of money." TV 4 P 450

* * * * *

Respectfully Submitted,

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Attorneys for Appellant
COASTAL PETROLEUM COMPANY

COASTAL PETROLEUM COMPANY, Appellant,

v.

FLORIDA WILDLIFE FEDERATION, INC.;SIERRA CLUB, FLORIDA CHAPTER; FLORIDA AUDUBON SOCIETY, INC.; ROBERT A. BUTTERWORTH, ATTORNEY GENERAL; ST. GEORGE ISLAND CIVIC CLUB; and DEPARTMENT OF ENVIRONMENTAL PROTECTION, Appellees.

No. 98-1998

District Court of Appeal of Florida, First District

Opinion filed October 6, 1999
Opinion on Rehearing June 26, 2000

An appeal from an order of the Division of Administrative Hearings.

John K. Aurell of Ausley & McMullen, Tallahassee, Susan W. Fox of Macfarlane, Ferguson & McMullen, Tampa, and Robert J.Angerer and Robert J. Angerer, Jr. of Angerer & Angerer, Tallahassee, for Appellant.

David G. Guest, and S. Ansley Samson, Earthjustice Legal Defense Fund, Tallahassee, for appellees Florida Wildlife Federation, Inc., Sierra Club, Florida Chapter, and Florida Audubon Society, Inc.

Barbara Sanders, Apalachicola, for appellee St. George Island Civic Club.

Maureen M. Malvern, Senior Assistant General Counsel, and Andrew J. Baumann, Senior Assistant General Counsel,

Office of General Counsel, and Jonathan A. Glogau, Assistant Attorney General, for appellee Department of Environmental Protection.

Monica K. Reimer, Assistant Attorney General, Tallahassee, for appellee Robert A. Butterworth, Attorney General.

BARFIELD, C.J.

In what may be one of the final chapters in the continuing saga of the appellant's quest to extract oil from beneath the Gulf of Mexico, it challenges an order of the Florida Department of Environmental Protection (DEP) denying its application for a drilling permit, ostensibly because oil extraction is potentially too dangerous to the environment. The appellant contends that the order must be reversed because DEP's interpretation of the applicable statute will result in an unconstitutional taking of its property. We affirm the order.

The decision in this case turns on the interpretation of section 377.241 Florida Statutes (1997):

> **Criteria for issuance of permits.** The division, in the exercise of its authority to issue permits as hereinafter provided, shall give consideration to and be guided by the following criteria:
>
> (1) The nature, character and location of the lands involved, whether rural, such as farms, groves, or ranches, or urban property vacant or presently developed for residential or business purposes or are in such a location or of such a nature as to make such improvements and developments a probability in the near future.
>
> (2) The nature, type and extent of ownership of the applicant, including such matters as the length of time the

applicant has owned the rights claimed without having performed any of the exploratory operations so granted or authorized.

(3) The proven or indicated likelihood of the presence of oil, gas or related minerals in such quantities as to warrant the exploration and extraction of such products on a commercially profitable basis.

The appellant asserts that in the past, DEP has issued permits when each criterion of section 377.241 "has been met," but that when DEP announced its intention to issue a drilling permit in this case, a group of environmental organizations challenged the decision, arguing that DEP was wrongly interpreting the statute, which requires the agency to "weigh" the criteria of section 377.241 balancing environmental interests against the right to explore for oil. Following an evidentiary hearing and the issuance of an order in which the hearing officer recommended granting the permit with a multi-million dollar surety, DEP reconsidered its past practice and agreed with the environmental petitioners that "meeting" each criterion was not legally sufficient. It then "balanced" the criteria and determined that issuance of a drilling permit was too dangerous to the coastal environment.

The appellant contends that DEP cannot "change its mind" about how to interpret the law without notice and rulemaking procedures, especially when the result is an unconstitutional taking of its property. We find that the appellant had adequate opportunity to be heard on the issue of the proper interpretation of section 377.241. DEP correctly determined that its previous practice was not consistent with the proper interpretation of the permitting statute and adequately explained its determination. Section 120.68(12), Fla. Stat. (1997). *Cf. Dept .of Administration v. Albanese*, 445 So.2d 639 (Fla. 1st DCA 1984) (Agency possesses only such authority as is specifically delegated to it

by statute and cannot promulgate rules that go beyond that grant of authority or are contrary to the intent of the legislature).

With respect to the constitutional challenge to DEP's interpretation of the statute, the issues of contract impairment and taking go hand-in-hand. There is no dispute that the appellant has a viable contract with the State of Florida to explore for and extract oil from submerged sovereignty lands. DEP's interpretation and application of the permitting statute, based on its determination that there is a compelling public purpose in not allowing the appellant to drill off shore, effectively prevents the appellant from exercising its rights under the contract. DEP's action would be unconstitutional only if just compensation is not paid for what is taken. Fla. Const. Art. X, § 6. This is a matter to be resolved in the circuit court.

AFFIRMED., BOOTH and WOLF, JJ., CONCUR.

ON MOTIONS FOR REHEARING, CLARIFICATION OR CERTIFICATION

PER CURIAM. . . .

Whether DEP's denial of the permit constitutes a taking for which compensation is due is not before us, and we decline to comment on the merits of that issue, leaving it to be resolved in the circuit court. *Tampa-Hillsborough County Expressway Authority. v. A.G.W.S. Corporation*, 640 So.2d 54 (Fla. 1994); *State, Department of Environmental Protection v. Burgess*, 667 So.2d 267 (Fla. 1st DCA 1995).

Except as discussed herein, all motions are denied.

BARFIELD, C.J., BOOTH and WOLF, JJ., CONCUR.

STATE OF FLORIDA, DEPARTMENT OF ENVIRONMENTAL PROTECTION

FLORIDA WILDLIFE FEDERATION, INC.; SIERRA CLUB, FLORIDA CHAPTER; and FLORIDA AUDUBON SOCIETY, INC.,

Petitioners, and

ROBERT A. BUTTERWORTH, ATTORNEY GENERAL,

Intervenor,

vs.

DEPARTMENT OF ENVIRONMENTAL PROTECTION and COASTAL PETROLEUM COMPANY,

Respondents

ST. GEORGE ISLAND CIVIC CLUB,

Petitioner,

and

ROBERT A. BUTTERWORTH, ATTORNEY GENERAL,

Intervenor,

vs.

DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondent.

OGC CASE NOS. 96-2521, 96-2962
DOAH CASE NOS. 96-4222, 96-5039

FINAL ORDER

On April 8, 1998, an Administrative Law Judge with the Division of Administrative Hearings (hereafter "DOAH") submitted her Recommended Order to the Department of Environmental Protection (hereafter "Department") . The Recommended Order indicates that a copy thereof was furnished to counsel for the parties. A copy of the Recommended Order is attached hereto as Exhibit A.

On April 23, 1998, Petitioners Florida Wildlife Federation, Inc.; Sierra Club, Florida Chapter; Florida Audubon Society, Inc. (hereafter "Environmental Petitioners"); and Petitioner St. George Island Civic Club, jointly with Intervenor Robert A. Butterworth, Attorney General, (hereafter collectively "Petitioners") timely filed with the Department Joint Exceptions to the Recommended Order. Also on April 23, 1998, Respondent Coastal Petroleum Company (hereafter "Coastal") filed Exceptions to the Recommended Order. On May 4, 1998, Coastal filed its Response to the Joint Exceptions. Also on May 4, 1998, Petitioners filed a Joint Response to Coastal's Exceptions, and the Department filed a Response to Coastal's Exceptions. The matter is now before me for final agency action.

BACKGROUND

Coastal filed Application no. 1281 on March 16, 1992, to drill an exploratory oil and gas well on sovereign submerged lands leased by it nine miles south of St. George Island, Florida. On August 16, 1996, the Department notified Coastal of its intent to issue Permit no. 1281 and required Coastal to publish notice of this intent. On August 30, 1996, the Environmental Petitioners timely filed a

verified petition for formal administrative hearing pursuant to section 403.412(5), Florida Statutes (1997). Petitions in opposition to the permit were also timely filed by the St. George Island Civic Club and by the St. George Island Plantation Owners' Association, Inc., but the Association's petition was later voluntarily withdrawn. The petitions were referred to DOAH, Administrative Law Judge Mary Clark, and consolidated (Case Nos. 96-4222 and 96-5038).

Coastal petitioned the First District Court of Appeal (Case No. 96-3226), asserting that it was entitled to a permit from the Department without further administrative proceedings and without a requirement that it publish notice of the Department's intent to issue the proposed permit. Over the Petitioners' objection, on October 3, 1996, the Administrative Law Judge (hereafter "ALJ") granted Coastal's request for stay of the administrative proceedings pending disposition of the appellate issues. On February 10, 1997, the District Court of Appeal denied Coastal's Petition for writ of certiorari Coastal published notice of the Department's Intent to Issue on March 20, 1997.

No additional parties filed petitions in response to the published notice. A Petition to Intervene by Attorney General Robert A. Butterworth was granted on July 30, 1997, without objection.

Pursuant to section 377.2425, Florida Statutes (1997), the Governor and Cabinet, acting as the Administration Commission, imposed surety requirements recommended by the Department as a condition of the permit. Coastal filed petitions with the Department and the Administration Commission protesting the surety requirements. These petitions were also referred to DOAH (Case Nos. 97-4362 and 97-4591) and consolidated with cases 96-4222 and 96-5038.

The DOAH final hearing of these consolidated cases took place in Tallahassee from October 20, 1997, through November 6, 1997, except for a one day public hearing in

Apalachicola. A total of 37 witnesses were heard, in addition to public testimony in Apalachicola, and numerous exhibits were received.

The hearing transcript was filed on January 29 and 30, 1998, and the parties' proposed recommended orders were filed on March 2 and 3, 1998. The ALJ'S Recommended Order was addressed to both the Department (as to the permit application) and the Administration Commission (as to the amount of surety) . Each agency is issuing a separate final order.

STANDARD OF REVIEW

A reviewing agency is authorized to reject or modify an administrative law judge's Conclusions of Law without limitation. § 120.57(1) (j), Fla. Stat. (1997); MacPherson v. School Bd. of Monroe County, 505 So. 2d 682, 683 (Fla. 3d DCA 1987); Siess v. Department of Health & Rehab. Servs., 468 So. 2d 478, 478 (Fla. 2d DCA 1985); Alles v. Department of Prof. Reg., 423 So. 2d 624, 626 (Fla. 5th DCA 1982).

The Findings of Fact of an administrative law judge (formerly "hearing officer"), however, may not be rejected or modified by a reviewing agency, "unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence." § 120.57(1) (j), Fla. Stat. (1997); Belleau v. Department of Envtl. Protection, 695 So. 2d 1305, 1307 (Fla 1st DCA 1997); Martuccio v. Department of Prof. Reg., 622 So. 2d 607, 609 (Fla. 1st DCA 1993)

Petitioners have filed exceptions only to Conclusions of Law, challenging the ALJ'S interpretation of section 377.241, Florida Statutes (1997). The Department reviews these exceptions *de novo* because it has the responsibility to interpret the statutes it administers. Public Employees

Relations Comm' n v. Dade County Police Benevolent Ass'n, 467 So. 2d 987, 989 (Fla. 1985) (upholding agency's authority to overrule hearing officer's interpretation of law); Alles, 423 So. 2d at 626 (holding that the agency need not defer to a hearing officer's interpretation of legislative intent).

GOVERNING STATUTE

This case turns on the meaning of the following statutory criteria for issuance of a permit for oil and gas exploration:

> 377.241. Criteria for issuance of permits.--The division, in the exercise of its authority to issue permits as hereinafter provided, *shall give consideration* to *and be guided by* the following criteria:
>
> *(1) The nature, character and location of the lands involved;* whether rural, such as farms, groves, or ranches, or urban property vacant or presently developed for residential or business purposes or are in such a location or of such a nature as to make such improvements and developments a probability in the near future.
>
> *(2) The nature, type and extent of ownership of the applicant, including* such matters as *the length of time the applicant has owned the rights claimed without having performed any of the exploratory operations* so granted or authorized.
>
> *(3) The proven or indicated likelihood of the presence of oil, gas or related minerals* in such quantities as to warrant the exploration and extraction of such products on a commercially profitable basis.

§ 377.241, Fla. Stat. (1997) (emphasis added)

The specific examples in section 377.241(1) refer to

uplands rather than to submerged sovereignty lands. However, this section should be construed in harmony with the rest of chapter 377 and with other laws affecting submerged sovereignty lands.[1] Unruh v. State, 669 So. 2d 242, 245 (Fla. 1996) (courts should "construe related statutory provisions in harmony with one another"); V.C.F. v. State, 569 So. 2d 1364, 1365 (Fla. 1st DCA 1990) (courts should read all provisions in a chapter *in pari materia)*

Section 377.24 prohibits *any* well from being drilled without a permit, while specifying locations (including submerged lands leased after specified dates) where the legislature has removed the Department's discretion to issue permits. Because Coastal's lease was executed before 1991, the Department retains discretion to make permitting decisions with regard to sovereign submerged lands covered by Coastal's lease, guided by the criteria in section 377.241.

In addition, the Department's interpretation of statutes governing its authorization of oil and gas wells should be consistent with state policies declared in the Florida Air and Water Pollution Control Act and the Florida Constitution: Pollution of air and waters constitutes a menace to public welfare and to aquatic life, § 403.021, Fla. Stat. (1997), and "[i]t shall be the policy of the state to conserve and protect its natural resources and scenic beauty," Art. II, § 7(a), Fla. Const. Laws should be construed "with reference to the

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[1] As noted by Petitioners, the law enacting section 377.241 contained a section expressly stating that its provisions "shall be cumulative and supplemental to all other provisions contained in chapter 377, Florida Statutes, on the same subject" and also "cumulative and supplemental to all other provisions of law relating to submerged or sovereignty lands or relating to the powers of the trustees of the internal improvement fund." Ch. 61-299, § 1, at 595, Laws of Fla. This provision was "repealed as being redundant" in 1977, Ch. 77-104, § 120, Reviser's Note, at 288, Laws of Fla., but its original presence corroborates the legislative intent that *in pari materia* principles apply to section 377.241.

constitution and the purpose designed to be accomplished, and in connection with other laws *in pari materia,* though they contain no reference to each other." American Bakeries Co. v. Haines City, 131 Fla. 790, 801, 180 So. 524, 528 (1938).

RULINGS ON PETITIONERS' EXCEPTIONS

Exception to Conclusion of Law 187

Petitioners challenge the introductory language in Conclusion of Law 187 ("[a]fter the three criteria of section 377.121 [sic] have been satisfied"), asserting that the term "satisfied" incorrectly interprets section 377.241 as a checklist of requirements to be passed or failed.[2] Petitioners correctly point out that section 377.241 does not constitute a pass-fail checklist, but rather guidelines for balancing interests. The statute "should be interpreted as calling for a weighing process where each criterion is evaluated and then weighed against the other factors." (Joint Exceptions at 2.)

By its own terms as well as in the context of other sections of chapter 377, section 377.241 charges the Department with balancing the interests of the fee simple owner against the interests of the mineral rights lessee. The title of the enacting legislation describes the statute as "relating to," among other matters, "the protection of surface rights of landowners" and "providing criteria . . . to issue permits for drilling or exploring and extracting through well holes."[3] Ch. 61-299, at 591. The preamble also refers to

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[2] By implication, Petitioners also challenge the last sentence of Conclusion of Law 180, which states that Coastal "has met" its burden of establishing entitlement to the permit it seeks.

[3] Coastal argues that the purpose of the law was to protect landowners from strip-mining, versus exploration through a well hole. (Coastal's Response to Joint Exceptions, Attachment C, unnumbered page 10.)

concerns of "the owners of the fee simple title" that mineral rights grantees not "unduly interfere with" the fee simple owners' use of their lands and "deems it to be in the public interest" to provide a remedy for the absence of "any system for the orderly determination" as to whether drilling or other operations should be permitted. Ch. 61-299, at 592, Laws of Fla.

The terms "give consideration to," "be guided by," and "criteria" also indicate that section 377.241 calls for balancing interests rather than simply checking off requirements. § 377.241. These terms imply a greater degree of discretion than do terms such as "condition," "shall," or "must," which the legislature uses to indicate specific requirements for permits. § 377.2424, Fla. Stat. (1997).

A similar balancing of interests is suggested by section 377.06, which declares, in pertinent part, that it is the public policy of the state "to provide for the protection and adjustment of the correlative rights of the owners of the land wherein [oil and gas] lie and the owners and producers of oil and gas resources," as well as "to safeguard the health, property, and public welfare of the citizens" of Florida. § 377.06, Fla. Stat. (1997).

For the above reasons, Petitioners' exception to the introductory language of Conclusion of Law 187 is granted.

Exception to Conclusion of Law 181

The first criterion to be considered by the Department is the "nature, character, and location of the lands involved." § 377.241, Fla. Stat. (1997). This criterion focuses on the

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Protection against strip-mining was one of the law's purposes, but the language of the law itself, the title, and the preamble also express the legislature's intent to protect landowners against the drilling of unduly burdensome wells.

interests of the fee simple owner. In this case, the fee simple owner is the Board of Trustees of the Internal Improvement Trust Fund of the State of Florida (hereafter "the Trustees") . The Trustees hold title to the lands and resources of Florida "in trust for all the people." Art. X, § 11, Fla. Const.; § 253.03, Fla. Stat. (1997).

The ALJ found that Coastal's proposed oil and gas well would be drilled "in the Gulf of Mexico within waters of the State of Florida, approximately nine miles south of St. George Island in Franklin County." (Finding of Fact 8.) She found that the impact of the drilling rig on the immediate site would be minimal. (Findings of Fact 11, 32, and 34.)
The ALJ also found that "[t]he obvious threat to St. George and other sensitive barrier islands, to Apalachicola Bay (a special management area), to the world-renown[ed] beaches, and to the commercially and environmentally treasured lands along the Florida panhandle coast, would be from an oil spill." (Finding of Fact 37.) The ALJ noted that special management areas are designated because of their unique habitats, living resources, recreational use, aesthetic importance, and other ecological, educational, consumptive, intrinsic, scientific, and economic values, (Finding of Fact 125), and that "[m]ost of the area in question is within some form of special management area as defined by statute," (Finding of Fact 126). She also found that nursery and breeding habitats are sensitive to even small amounts of oil. (Finding of Fact 167.)

The ALJ further found that "the chance of a damaging spill from drilling the proposed exploratory well is extremely remote," (Finding of Fact 38), that blowouts are rare, but they do happen, (Finding of Fact 92), and that a hypothetical discharge, although originating outside of any special management area, will impact natural resources within the Apalachicola Bay special management area, (Finding of Fact 168).

These Findings of Fact are unchallenged. However,

Petitioners challenge the ALJ's Conclusion of Law 181, which reads as follows:

> 181. The first criterion, on its face, has a more limited application than that proposed by the Environmental Petitioners. The legislature's intent to preclude drilling in coastal waters is effectuated not in section 377.241, Florida Statutes, but in section 377.242, Florida Statutes, which includes a specific exception for leases entered prior to June 7, 1991. As found above, Coastal's permit meets the first criterion.

This Conclusion of Law discounts or overlooks the importance of the first statutory criterion of section 377.241, the "nature, character and location of the lands involved." The effect of Coastal's exclusion from the prohibitions of section 377.242 is simply to leave the Department's permitting decision subject to the criteria of section 377.241. As discussed above, these criteria are not tests to be "met," but considerations to guide the Department's discretion in determining whether to grant or deny a permit.

Apparently the ALJ reaches her conclusion that Coastal's permit "meets" the first criterion on the basis that the chance of an oil spill is remote. (Finding of Fact 38.) However, Petitioners correctly point out that the relevant criterion is not the chance of a blowout, but the nature of the lands involved.

The generality of the term "lands involved" suggests that the Department should look beyond the immediate footprint of the drilling rig. § 377.241(1). Moreover, as noted above, the overall purpose of the statute was to institute a permit process in order to protect landowners from undue burdens from mineral leases. Ch. 61-299, at 592, Laws of Fla. This remedial purpose should be liberally construed. Conner v. Division of Elections, 643 So. 2d 75,

77 (Fla. 1st DCA 1994) (remedial statutes "should be liberally construed so as to suppress the evil identified by the legislature, and to advance the remedy intended")

The "evil identified" by the legislature was the lack of a permitting process, leaving landowners under a threat that mineral rights lessees might "unduly interfere with" the "proper and appropriate use as might be indicated by the character or location of the land."[4] Ch. 61-299, at 592. The policies enunciated in Chapter 403 of the Florida Statutes and in Article II, Section 7(a) of the Florida Constitution, as discussed above, also suggest that the Department should consider lands and waters potentially impacted by pollution. Unruh, 669 So. 2d at 245 (construing related statutory provisions harmoniously)

The special characteristics of the lands involved, as noted in Findings of Fact 37, 125, 126, 167, and 168, are crucial to evaluation of the first permit criterion, the landowner's interest. The public trust interest in these special lands weighs heavily against issuance of a drilling permit. The Department grants Petitioners' exception to Conclusion of Law 181.

Exception to Conclusion of Law 182

On the other hand, the second and third criteria to be

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[4] Coastal attempts to exclude environmental considerations from the statute by restricting the Department from considering land uses other than those specifically enumerated in section 377.241(1) (e.g., agricultural, urban, residential). (Coastal's Response to Joint Exceptions, Attachment C, unnumbered page 12.) However, this interpretation would thwart application of the statute to submerged lands held in public trust. Cf. Smalley Transp. Co. v. Moed's Transfer Co., 373 So. 2d 55, 57 (Fla. 1st DCA 1979) (warning that the "Expressio unius" maxim should be used with caution to avoid thwarting legislative intent, for "it is not of universal application")

considered by the Department both address the interest of the owner of the mineral rights. The second criterion directs the Department to consider "the nature, type and extent of ownership of the applicant, including such matters as the length of time the applicant has owned the rights claimed without having performed any of the exploratory operations so granted or authorized." § 377.241(2).

Rather than recounting in detail the "50 + years' history" of Coastal's leases, the ALJ refers to factual narratives in court opinions such as Watson v. Holland, 20 So. 2d 388 (Fla. 1945), and Coastal Petroleum v. Chiles, 701 So. 2d 619 (Fla. 1st DCA 1997), review denied~ 707 So. 2d 1123 (Fla. 1998). (Findings of Fact 46, 49.) The original lease to Coastal's predecessor was executed in 1944. Watson, 20 So. 2d at 389. It was not a disposition of title, but "the granting of a limited right to take [minerals] from the lands or water bottoms owned by the State." Id. at 392. Between 1947 and 1968, Coastal conducted geologic and seismic studies and drilled 22 wells, finding nothing except in one inland site. Coastal, 701 So. 2d at 622. In a 1976 settlement agreement Coastal surrendered all but the outermost portion of its lease area. (Finding of Fact 49.) In 1992 Coastal submitted five offshore drilling applications to the Department, later reduced to one. (Finding of Fact 13.)

The ALJ found that Coastal had not abandoned oil exploration in favor of a "greenmail" attempt to incite the State to buy its leases. (Finding of Fact 50.) "For many of the 50 years, litigation has eclipsed oil, gas and mineral exploration in the vast leases," but not all of the litigation was initiated by Coastal and none was found to be frivolous. (Id.)

These Findings of Fact are likewise unchallenged. However, Petitioners challenge Conclusion of Law 182, which reads as follows:

> 182. Coastal's lease 224-A includes

> requirements for lease payments and for certain minimal drilling or exploration activity. As found above, Coastal has satisfied those requirements and there is no competent evidence that it has abandoned its drilling rights under the lease. Coastal's permit meets the second criterion.

This interpretation oversimplifies the governing statute. Certainly abandonment of the lease would weigh heavily against issuance of the permit, but again this is not a simple pass-fail test. Facts well short of "abandonment" are also relevant. The ALJ correctly points out that "[n]othing in the text of the three criteria require[s] consideration of the applicant's 'motive.'" (Conclusion of Law 184.) However, the fact that for many years the applicant held its lease without exercising its exploration rights, (Finding of Fact 50), is expressly made relevant to the second criterion. § 373.241(2), Fla. Stat. This criterion weighs somewhat against issuance of the permit. To this extent, the Department grants the Petitioners' Exception to Conclusion of Law 182.

Exceptions to Conclusions of Law 183 and 186

Like the second criterion, the third criterion also evaluates the applicant's interest in oil and gas rights: "The proven or indicated likelihood of the presence of oil, gas or related minerals in such quantities as to warrant the exploration and extraction of such products on a commercially profitable basis." § 377.241(3), Fla. Stat.

The ALJ makes extensive Findings relevant to the third criterion: The target of exploration is an anticipated structure within the Jurassic Smackover and Norphlet formations, which provide commercially-viable oil production in the Jay field in northwest Florida, (Findings of

Fact 9 and 59); in the experience of one witness, the standard industry expectation is a one in ten chance in a frontier well such as this "wildcat" well (a well drilled outside of a producing field), (Finding of Fact 51); the Department has rarely used this criterion to deny an application, (Finding of Fact 52); Department statistics show a success rate for wildcat wells throughout Florida of about 2-3 %, (Finding of Fact 53); Department staff determined that the siting of permit 1281 was reasonable, and this determination was supported by the evidence, (Findings of Fact 54, 66); "Coastal presented sufficient evidence of the anticipated commercial profitability of the well," (Finding of Fact 55); geologists agree that "the only way we can determine whether oil is present is to dig a hole," (Finding of Fact 56); the contour lines interpreted by Coastal's experts "show a promising geologic structure at the site of Permit no 1281" and contribute to their credible opinions that the site is commercially viable, (Findings of Fact 58, 76); the process of determining whether the essentials for an oil field exist requires acquisition of data from prior wells, including dry wells, (Finding of Fact 64); magnetic, seismic, and gravity testing also yields valuable data, and the more data available the more accurate the map, but prospects have been drilled without expensive and possibly subjective site-specific tests, (Findings of Fact 64, 65).

Again these Findings of Fact are unchallenged. However, Petitioners challenge Conclusion of Law 183, which reads as follows:

> 183. The third criterion does not suggest that the prospect for finding oil must be a sure thing. Every expert testifying on this issue in this proceeding agreed that petroleum exploration is a risky business. Even in a proven productive field, dry holes are drilled. Petroleum geologists rely on data obtained from a variety of sources to select a drilling

> site, but only the drilling itself can determine with certainty what lies beneath that site. A wealth of credible evidence was presented by the parties on this issue. No evidence could utterly foreclose the possibility that Phillip Ware's prospect is all that he predicts. The greater weight of the evidence establishes that it is a[t] least worth a look.

Petitioners also take exception to Conclusion of Law 186, which states in part: "Mere speculation that oil exists or does not exist does not offend the third criterion in the grant of a drilling permit."

Although otherwise well-founded, these Conclusions of Law again misread the statutory criterion as a pass-fail test. Certainly, if the Department were simply checking off a list of requirements Coastal would have met this requirement. However, the Department is charged instead with balancing interests, and Petitioners correctly point out that "at least worth a look," (Conclusion of Law 183), rates fairly low on the statutory scale of "proven or indicated likelihood," § 377.241(3). (Joint Exceptions at 9.) To this extent, the Department grants Petitioners' Exceptions to Conclusions of Law 183 and 186.

Exception to Conclusion of Law 184

Petitioners' final exception is to Conclusion of Law 184, which reads as follows:

> 184. Nothing in the text of the three criteria require consideration of the applicant's "motive." If the Environmental Petitioners are correct in their apprehension of "Greenmail" by Coastal to induce the state to buy its lease or to support a claim of inverse condemnation or "taking," the surest way to dissipate those motives is to permit the drilling.

Petitioners contend instead that "one of the harms" that section 377.241 is intended to prevent "is the issuance of oil drilling permits to persons whose motive is to use the permit as a device to force the surface owner to purchase oil and mineral rights." (Joint Exceptions at 3.) However, the Department agrees with the ALJ that nothing in the language or history of the statute suggests that the Department should consider the applicant's motive. Instead, as discussed above, the statute charges the Department with balancing the interest of the landowner against the interest of the owner of mineral rights, looking to specific, relatively objective factors. For these reasons, Petitioners' Exception to Conclusion of Law 184 is denied.

RULINGS ON COASTAL'S EXCEPTIONS

Exception to Findings of Fact 16 and 75, Conclusion of Law 178

Coastal's Exception no. 4 challenges Findings of Fact 16 and 75 and Conclusion of Law 178, which address permit conditions imposed by the Department in addition to the surety: a magnetometer and sidescan survey, a spill trajectory analysis, an inventory of oil spill equipment, and a hydrogen sulfide dispersion model.[5] (Findings of Fact 73-74; Coastal's Exceptions at 6.) The ALJ found that the agency "had a sound rational basis to require each item" and that the issue is moot since Coastal has already complied with the conditions. (Finding of Fact 75.) She concluded that "[t]he conditions imposed by DEP on Coastal's permit are well within the ambit" of the agency's statutory authority.

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[5] Coastal's challenges to the surety (Exceptions 1-3) are addressed by the Governor and Cabinet sitting as the Administration Commission and are not addressed in the Department's Final Order.

(Conclusion of Law 178.)

Coastal's Exception no. 4 is without merit. The Department is authorized to issue orders "governing all phases of" oil and gas exploration in order to minimize damage. § 377.22(2), Fla. Stat. (1977). Statutory language such as "appropriate safety equipment," § 377.22(2) (c), prevention of "injury to neighboring . . .property," § 377.22(2) (i), and minimiz[ing] the impact on hydrology and biota of the area," § 377.22(2) (v), indicate the appropriateness of the required conditions, and the record provides support for the ALJ's Conclusion that the conditions were appropriate. (Tr., Vol. 25, at 3311-15.) In addition, the issues concerning permit conditions are moot for the reasons given by the ALJ. Therefore, Coastal's Exception no. 4 (to Findings of Fact 16 and 75, Conclusion of Law 178) is denied.

Exception to Finding of Fact 172

Coastal challenges Finding of Fact 172, in which the ALJ denies both Petitioners' and Coastal's requests for costs and attorney's fees. The ALJ states that "[t]his lengthy proceeding, competently and diligently tried by all parties, yields no evidence of bad faith or improper purpose or any other basis for award of fees cognizable under Chapter 120." (Finding of Fact 172.) Review of the entire record indicates no basis to overturn this Finding. Additionally, the Petitioners have become the prevailing party in this Final Order. Coastal's Exception no. 5 (to Finding of Fact 172) is denied.

CONCLUSION

Applying the statutory criteria of section 377.241 to the facts determined by the ALJ, the Department must balance the Trustees' interest in lands they hold in public

trust against the interest of the applicant. On the one hand, the "lands involved" include sensitive barrier islands, Apalachicola Bay (a special management area), world-renowned beaches, and "commercially and environmentally treasured lands along the Florida panhandle coast." (Finding of Fact 37.) On the other hand, the applicant's mineral rights were unexercised over a long period, (Findings of Fact 49, 50), and are speculative, (Findings of Fact 51, 53, 56; Conclusions of Law 183, 186).

Weighing evidence is the province of the trier of fact, but balancing policy interests is the province of the agency. Cross v. Department of Health & Rehab. Servs., 658 So. 2d 1139, 1143 (Fla. 1st DCA 1995) ("Striking the proper balance between . competing policy considerations" is a decision to be made by an agency, as guided by the legislature); Florida Power Corp. v. Department of Envtl. Reg., 638 So. 2d 545, 546 (Fla. 1st DCA), review denied, 650 So. 2d 149 (Fla. 1994) (affirming DER's determination "that the public interest in the extent of the impact on the environment . . . was a policy matter for its determination and not a question of fact to be resolved by the hearing officer") . In the present case, the balance tips against issuance of a permit to drill an exploratory well nine miles south of St. George Island.

It is therefore ORDERED:

A. The ALJ's Findings of Fact are adopted in their entirety and incorporated herein by reference.

B. The ALJ's Conclusions of Law 180, 181, 182, 183, 186 and 187 are rejected or modified as indicated above. Conclusions of Law 173-79 and 184-85 are adopted and incorporated herein by reference [6]

C. The Notice of Intent to Issue Permit issued by the Department on August 16, 1996, is REVERSED.

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[6] Conclusions of Law 188-202 concern issues regarding the surety to be imposed and are not addressed in the Department's Final Order.

D. Coastal's application filed with the Department requesting issuance of a permit in connection with their proposed drilling of a well for exploration of oil and gas, Permit no. 1281, is DENIED.

Any party to this proceeding has the right to seek judicial review of the Final Order pursuant to section 120.68, Florida Statutes, by the filing of a Notice of Appeal pursuant to Rule 9.110, Florida Rules of Appellate Procedure, with the clerk of the Department in the Office of General Counsel, 3900 Commonwealth Boulevard, M.S. 35, Tallahassee, Florida 32399-3000; and by filing a copy of the Notice of Appeal accompanied by the applicable filing fees with the appropriate District Court of Appeal. The Notice of Appeal must be filed within 30 days from the date this Final Order is filed with the clerk of the Department.

DONE AND ORDERED this 22nd day of May, 1998, in Tallahassee, Florida.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION
_____/s/_____ by Kirby B. Green, III
for VIRGINIA B. WETHERELL
Secretary

Marjory Stoneman Douglas Building
3900 Commonwealth Boulevard
Tallahassee, Florida 32399-3000

FILING AND ACKNOWLEDGMENT FILED, ON THIS DATE, PURSUANT TO §120.52 FLORIDA STATUTES, WITH THE DESIGNATED DEPARTMENT CLERK, RECEIPT OF WHICH IS HEREBY ACKNOWLEDGED

_____/s/_____ 5/22/98
CLERK

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

Case No. 96-4222, Case No. 96-5038,
Case No. 97-4362, Case No. 97-4591

FLORIDA WILDLIFE FEDERATION, INC.;
SIERRA CLUB, FLORIDA CHAPTER; and
FLORIDA AUDUBON SOCIETY, INC.,

Petitioners,

and

ROBERT A. BUTTERWORTH, ATTORNEY
GENERAL,

Intervenor,

vs.

DEPARTMENT OF ENVIRONMENTAL
PROTECTION and COASTAL PETROLEUM
COMPANY,

Respondents.

ST. GEORGE ISLAND CIVIC CLUB,

Petitioner,

and

ROBERT A. BUTTERWORTH,
ATTORNEY GENERAL,

Intervenor,

vs.

DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondent.

COASTAL PETROLEUM COMPANY,

Petitioner,

vs.

ADMINISTRATION COMMISSION,

Respondent.

COASTAL PETROLEUM COMPANY,

Petitioner,

vs.

ADMINISTRATION COMMISSION,

Respondent.

RECOMMENDED ORDER

Pursuant to notice, the Division of Administrative Hearings, by its duly designated Administrative Law Judge,

Mary Clark, held a formal hearing in the above-styled consolidated cases beginning on October 20, 1997, and continuing until completed on November 6, 1997. The hearing was held in Tallahassee, Florida, with the exception of the public hearing on October 29, 1997, in Apalachicola, Florida.

APPEARANCES

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STATEMENT OF THE ISSUES

The issues in these consolidated cases are whether Coastal Petroleum Company is entitled to an oil and gas exploration permit (Permit no. 1281) and, if so, what conditions should attach, including a reasonable surety amount.

PRELIMINARY STATEMENT

On August 16, 1996, the Department of Environmental (DEP) notified Coastal Petroleum Company (Coastal) of its intent to issue Permit no. 1281. On August 30, 1996, Florida Wildlife Federation, Inc., Sierra Club, Florida Chapter, and Florida Audubon Society, Inc. (Environmental Petitioners), filed a verified petition for formal administrative hearing pursuant to Section 403.412(5), Florida Statutes, disputing the intended permit.

Petitions in opposition to the permit were also filed

by the St. George Island Civic Club and by the St. George Island Plantation Owners' Association, Inc. When the petitions were forwarded to the Division of Administrative Hearings (DOAH) for conduct of a formal evidentiary hearing, the cases were assigned numbers 96-4222, 96-5038 and 96-5047, respectively, and were consolidated. Later, the St. George Island Plantation Owners' Association, Inc., voluntarily withdrew its petition and the file in Case No. 96-5047 was closed.

In the meantime, Coastal filed a Petition for Review of Nonfinal Agency Action (Case No. 96-3226) and an alternative Notice of Appeal (Case No. 96-3227) in the First District Court of Appeal asserting that it was entitled to a permit from DEP without further administrative proceedings and without a requirement that Coastal publish notice of the proposed permit.

Over the objection of the Environmental Petitioners, the Administrative Law Judge granted Coastal's request for stay of the administrative proceedings pending disposition of the appellate issues (order entered October 3, 1996). In a letter dated March 17, 1997, counsel for Coastal informed the Administrative Law Judge that its Writ of Certiorari and Motion for Clarification had been denied and that Coastal would publish notice of DEP's Intent to Issue on March 20, 1997.

No additional parties filed petitions in response to the published notice and in an order entered April 30, 1997, the Administrative Law Judge set the formal hearing to commence on September 29, 1997.

A Petition to Intervene by Attorney General Robert A. Butterworth was granted on July 30, 1997, without objection.

The hearing was continued until October 20, 1997,

after DEP and the Governor and Cabinet acting as the Administration Commission applied newly-enacted Chapter 97-49, Laws of Florida (codified as Section 377.2425(1)(c), Florida Statutes) and required as a condition of Permit No. 1281 that Coastal provide surety of $4,249,637,886. In response to the surety action Coastal filed two petitions for formal hearing, one directed to the Administration Commission (referred to DOAH and assigned Case No. 97-4362) and the other directed to DEP, which had calculated and recommended the surety amount (referred to DOAH and assigned Case No. 97-4591). These petitions were consolidated with the pending cases and all four proceeded to hearing as described above.

The parties filed their prehearing stipulation on October 16, 1997. At the commencement of the hearing the Environmental Petitioners were permitted to amend their petition to clarify some issues, to delete others, and to add a request for attorney's fees.

At the hearing Coastal presented the following witnesses:

> Phillip W. Ware, president of Coastal, a professional geologist and an expert in petroleum exploration; Ed Garrett, the DEP employee and professional geologist who processes applications for drilling permits; Anthony Randazzo, Ph.D., an expert in geology and educational geology; Ed Shell, an expert in design and implementation of drilling, casing and cementing programs; Jim Rushing, an expert in offshore environmental considerations of drilling fluids; Tom Herbert, Ph.D., an expert in environmental planning, operation and response, and a professional geologist; Lawrence David Curry, the DEP oil and gas section administrator who reviews applications for drilling permits and is a professional geologist; William

Sackett, Ph.D., an expert in marine geochemistry, with emphasis in oil in the sea, inputs and fates; Harry Roberts, Ph.D., an expert in oil and gas seeps and vents in the sea; Charles Wilson, Ph.D., an expert in fisheries and oil and gas platforms; Nick Stratus, Ph.D., the DEP economist who calculated the surety amount; John Supan, Ph.D., an expert biologist with emphasis on oysters; Irving Mendelssohn, Ph.D., an expert in coastal plant ecology, with extensive experience in coastal marshes related to oil spills and cleanup of oil spills; Shea Penland, Ph.D., an expert in coastal geomorphology, marine science, and the effects and cleanup methods of oil spills on coastal habitats of the Gulf of Mexico; Kenneth Shaw Thompson, an expert in cleanup of oil spills; Dagmar Etkin, Ph.D., an expert in oil spill information, analysis and statistics; William H. Colona, a professional geologist and representative of Woodward Clyde Consultants, an environmental consulting firm; Philip Sorensen, Ph.D., an expert in oil and gas economics, viability of rates of return and economic consequences of oil spills; Theodore Bourgoyne, Jr., Ph.D., an expert petroleum engineer with extensive experience in well control and historic well control events; Deborah French, Ph.D., an expert in oil spill trajectory modeling and oil spill events; Jacqueline Michel, Ph.D., an expert in oil spill response, specifically determining the resources at risk, developing protection priorities, and shoreline cleanup decision-making; Bruce D. Graham, an expert in preparation of photodocumentation surveys, visual analysis and quality control of data collection and photodocumentation; Janet Voorhees, an expert in the area of information on oil and planning; Mike NeSmith, a vice president of Noble Drilling, the contractor who plans to drill the well and an expert in

offshore drilling; Clay Durham, Ph.D., an expert in petroleum exploration education and petroleum exploration; Jamil Azad, an expert in petroleum exploration and geophysics; Charles Morrison, an expert in seismic interpretation, geophysics and the Smackover formation; Barry Faulkner, an expert in petroleum exploration geology, generation and evaluation of oil and gas prospects, and in estimating the geologic risks and reserves of a prospect; Al Shannon, an expert in oil and gas field development planning and estimating the costs of such development; George C. Hite, an expert petroleum engineer, with experience in field development planning, cost and viability of prospects; Samuel O. Sugiyama, Ph.D., an expert in risk assessment; and by deposition on rebuttal, Doug Smith, Ph.D., an expert in geophysics and the basement structure of Florida.

The Environmental Petitioners and Attorney General presented the following:

James Thompson, an expert geophysicist with expertise in interpreting seismic lines and identifying petroleum and hydrocarbon bearing structures; Mike Cheeseman, an expert in evaluating oil prospects and an oil exploration geologist; and Murphy Ellen Chandler, a paralegal with experience in title searching.

The DEP presented the following witnesses:

William Gambrell, a DEP employee who is an expert in the area of flow rates from oil wells; Ernie Barnett, a DEP employee who is an expert in natural resource damage assessments; George Henderson, a DEP employee who is an expert in marine biology,

Florida marine habitats and resources, and impacts of hydrocarbon releases on same; and Walter Schmidt, Ph.D., the chief of the Florida Geological Survey, the State Geologist, and an expert in geology, Florida geology, Florida stratigraphy and petroleum geology.

The St. George Island Civic Club witnesses testified at the public hearing conducted in Apalachicola, Florida.

The Administration Commission did not present evidence.

The following exhibits were received in evidence: Coastal's Exhibits no. 2, 3, 7-9, 12, 14, 16, 17, 20, 22-25, 30, 32-34, 36, 37, 39, 42-46, 48, 49, 51, 55, 56, 58-76, 84, 87-96, 99, 101, 105, 108, 113, 115-119, 123, 131-134, 140, 141, 143, 145(a) and (b), 147, 149, 151, 153, 155, 157, 159, 161, 163, 164, 167, 169, 171, 174, 176, 180, 182, 185, 186, 189, 193, 195, 197, 199-201, 204, 205, 206, 208, 211, 214, 215, 227, 228, 230-233, 238, 241, 242, 244, 248, 254, 255, 257, 259, 264-267, 271, 273-281, 283, 284, 295, 296, 299-303, 306, 319, 334, 335, 355-359, 361-379, 383, 384, 388, 391, 392, 394, 395, 400-405, 407, 408, 416, 426, 434, 444-459, 462, 465, 470-472, 474(1-g), 475(a-c), 480-483, 494, 495, 503-505, 509, 513, 514, 517-524, 527, 528, 531-537, 539-583, 585, 594-597, 604, and 606; DEP Exhibits no. 1, 1-14, 16-32, 34, 35, 37, 40, 46, 47, 49, 51, 52, 57-59, and 61; Environmental Petitioners' Exhibits no. 7, 10, 12, 13, 15, 16, 21, 29, 30(a-q), 35, 78-83, 85, 117, 128, 131, 135-138, 140-142, 146, 152-154, and 156, and Attorney General's Exhibits no. 1, 3, 6, and 26.[1]

By stipulation executed on October 1, 1992, the parties agreed that certain proprietary geophysical data (primarily seismic profiles covered by a license agreement between Coastal and Western Geophysical) would be presented at hearing as demonstrative exhibits and would be

returned to Coastal. One exhibit, Environmental Petitioners' no. 142A, is part of the record in this proceeding, but is confidential and sealed pursuant to Section 377.2409(1), Florida Statutes.

The 26-volume transcript of hearing was filed on January 29 and 30, 1998; the parties' proposed recommended orders, briefs and written argument were filed on March 2 and 3, 1998.

Because there are two agencies with final order authority in this proceeding, DEP (as to permit applications) and the Administration Commission (as to amount of surety), this recommended order is submitted to both agencies. The record (transcript and exhibits) is being forwarded to DEP.

FINDINGS OF FACT

Parties

1. The applicant Coastal Petroleum Company, (Coastal) is an oil and gas company originally named Arnold Oil Exploration Company, formed in 1941 as a Florida corporation. Its majority owner is Coastal Caribbean Oils and Minerals, Ltd., a company publicly traded on the Boston Stock Exchange. Phillip Ware is president of Coastal, having been elected to that position in 1985.

2. The Department of Environmental Protection (DEP) is the agency of the state responsible for implementing laws and regulations governing oil and gas permits. DEP was created pursuant to Section 20.255, Florida Statutes, as the successor agency to the Florida Department of Environmental Regulation and Department of Natural Resources.

3. The Environmental Petitioners are the Florida

Wildlife Federation, Inc., Sierra Club, Florida Chapter, and Florida Audubon Society, Inc. Florida Wildlife Federation and Florida Audubon Society are non-profit Florida corporations and citizens of the state.

4. The St. George Island Civic Club is an organization formed by and on behalf of property owners and residents of St. George Island, Franklin County, Florida.

5. The Administration Commission is a collegial body composed of the Governor and Cabinet of the State of Florida, pursuant to Section 14.202, Florida Statutes.

6. The Attorney General of the State of Florida has intervened in this proceeding pursuant to Section 403.412(5), Florida Statutes.

7. The Attorney General, Environmental Petitioners and St. George Island Civic Club oppose the grant of Permit no. 1281 to Coastal and support a surety requirement in at least the amount established by the Administration Commission on the recommendation by DEP. (DOAH Cases Nos. 96-4222 and 96-5038.) Coastal supports the intended grant of its permit except for certain conditions which it claims are without authority; Coastal opposes the surety recommended by DEP and set by the Administration Commission. (DOAH Cases Nos. 97-4362 and 97-4591.)

The Project

8. The activity that is the subject of the application at issue (Permit no. 1281) is Coastal's drilling of a single exploratory oil and gas well in the Gulf of Mexico within waters of the State of Florida, approximately nine miles south of St. George Island in Franklin County.

9. The target of the exploration is an anticipated

structural oil trap within the Jurassic Smackover and Norphlet geological formations. These are the same formations which provide commercially-viable oil production in the Jay field in northwest Florida. The anticipated well depth is 13,000 to 15,600 feet but the permit would allow drilling to the basement or 18,000 feet, whichever occurs first.

10. Coastal's drilling contractor, Noble Drilling Company, has drilled wells all over the world since 1925. It has been responsible for approximately 10 percent of all the wells drilled in the Gulf of Mexico, or about 190 wells a year, for both major and small independent oil companies.

11. If permitted, Noble will install a portable drilling rig, the Paul Wolff, or similar sister rig, with three columns and footing that will sit on the relatively featureless sea bottom at Coastal's offshore site. The rig will be staffed by a trained Noble crew and will be operated in a zero-discharge mode. That means nothing will be allowed to escape from the rig into the water, including drill cuttings, sewage treatment water, garbage or rain water. Surrounding the rig will be a high seas oil fence with locks, a cleanup crew and vessel, and an evacuation vessel.

12. When drilling is completed, the rig will be removed and the well either abandoned or transferred to production mode with a production platform. With the exception of a 90-day test period covered by the initial drilling permit, all production-related activity must be permitted under a separate application which is not the subject of this proceeding.

The Application Process

13. On March 16, 1992, Coastal submitted 5 offshore drilling applications to the DEP, Bureau of

Geology. Assigned numbers 1277-1281, two proposed sites were offshore of Franklin County, and three were offshore of southwest Florida. Later, applications 1277-1280 were withdrawn and only Permit no. 1281 proceeded through review to a Notice of Intent to Issue.

14. As required, Coastal submitted DEP's one-page Form 3 and included a location plat and filing fee. The application form is only for drilling an exploratory well and not for any oil or gas production.

15. The application's number "1281" denotes that 1280 drilling applications have preceded it since the 1940's when DEP's predecessor agency began formal review. Not all of these proceeded through complete review; many were withdrawn, but most were approved.

16. Coastal's was not a routine application. Since the 1940's, leases and activities related to offshore oil and gas exploration in Florida have been the subject of continuous legal disputes. Most applications are for on-shore drilling and DEP's regulations and review process are more relevant to those land- based operations. The review of Coastal's application therefore, by DEP staff, Ed Garrett, and others, was a commonsense extrapolation from their checklist and other sources reasonably, but not directly, related to the application at hand, for example, federal rules governing outer continental shelf (OCS) drilling.

17. On April 8, 1992, Ed Garrett detailed in a letter to Phillip Ware the following information needed to complete the application:

a) A professional ecological/biological survey and report and photodocumentation of the proposed drill site to permit staff review of the bottom areas and potential impact on natural resources;

b) An assessment of ambient conditions in the

vicinity of the well site, including potential impacts on coastal habitats, air quality, endangered and threatened species, marine mammals, birds, commercial fishing, recreational resources and archeological resources;

c) A zero discharge policy for offshore drilling consistent with the policy established in 1982 when the DEP issued a drilling permit to Getty Oil for drilling in East Bay;

d) An oil spill response plan for recapture of escaped pollutants;

e) A description of the offshore drilling rig to be used;

f) A hurricane response plan, also an item related to the prior Getty drilling permit;

g) A surety in the amount of $15,000,000, to be recommended by staff to the Governor and Cabinet (a sum of $50,000,000 for all 5 wells was also addressed);

h) Description of how the rig design will account for potential Karst collapse;

i) Description of helicopter activity associated with field operations;

j) Description of support locations and facilities to be used with the drill site, including proposed plan for transport of crude oil;

k) a casing program;

l) A cementing program;

m) List of proposed drilling muds and their chemical components;

n) A hydrogen sulfide contingency plan; and

o) A blowout prevention plan.

18. Mr. Ware addressed each of these requirements in a response dated November 24, 1992. In lieu of the surety, he enclosed a check to the Petroleum Exploration and Production Bond Trust Fund in the amount of $4,000 pursuant to Section 376.40, Florida Statutes. His response included detailed attachments describing the proposed drilling operation.

19. DEP furnished copies of the application and additional materials to interested parties, including the Big Bend Sierra Club and Florida Audubon Society, on November 25, 1992. The Sierra Club had previously sent a letter concerning Coastal's permit application. On December 18, 1992, a meeting was held to consider the materials furnished by Coastal.

20. A letter dated January 11, 1993, from Jeremy A. Craft, Director of the Division of Resource Management, to Phillip Ware addresses deficiencies in the November 1992 submittal specifically related to the site-specific photodocumentations survey, environmental conditions and assessment of impacts, hydrogen sulfide contingency plan, zero discharge requirement, and oil spill contingency plan. The letter also states that the agency completed its own natural resource damage assessment using the schedule prescribed in Section 376.121, Florida Statutes, and data submitted by Coastal, and staff determined that, in addition to joining the Petroleum Exploration and Production Trust Bond Fund, security of $500,000,000 would be required to cover potential liability for damages and $15,000,000 would be needed to cover cleanup costs.

21. Phillip Ware responded by the January 15, 1993, deadline, providing additional information and agreeing that the following would be performed as a condition of the permit: magnetometric and side sonar surveys of the drill site, hydrogen sulfide dispersion model, and oil spill trajectory analysis. Protesting the requirement for additional surety, Coastal offered the value of its leases as evidence of its ability to pay for any damages and cleanup costs.

22. Walter Schmidt, Chief of the Florida Geological Survey, with other agency staff, reviewed the latest submittals and recommended denial of Coastal's

permit, primarily based on failure to provide liquid financial surety of sufficient value "to cover any and all potential damages to the environment."

23. On February 22, 1993, the Florida Department of Natural Resources issued its final order memorializing the January 26, 1993, decision of its head, the Governor and Cabinet, denying Coastal's permit application. Consistent with the notice of rights included in the order, Coastal timely filed a petition for a formal hearing, and later requested an informal administrative hearing on the issue of the agency's authority to require additional surety.

24. Individuals with royalty interest in the potential oil and gas production petitioned and were granted leave to intervene in the administrative proceeding. No other parties intervened.

25. On December 17, 1993, the assistant secretary of DEP, acting as hearing officer in the informal proceeding, entered his Final Order denying Coastal's petition and adopting the order previously entered on February 22, 1993, as the agency final order. Coastal appealed.

26. On February 9, 1995, the First District Court of Appeal reversed denial of Coastal's application, holding that the Department had no authority to require surety in excess of that authorized by statute. See Coastal Petroleum Company v. Department of Environmental Protection, 649 So. 2d 930 (Fla. 1st DCA 1995), cert. denied, 660 So. 2d 772 (Fla. 1995).

27. During the remand to the Department, the Board of Trustees of the Internal Improvement Trust Fund voted to require a $1,900,000,000 bond as a condition of the lease and DEP again denied Coastal's application for failure to provide this additional surety. On April 26, 1996, the

First District Court of Appeal again reversed the denial of Coastal's application, again holding that the Department had no authority to require surety in excess of that authorized by statute. See Coastal Petroleum Company v. Department of Environmental Protection, 672 So. 2d 574 (Fla. 1st DCA 1996) and Coastal Petroleum Co. v. Chiles, 672 So. 2d 571 (Fla. 1st DCA 1996).

28. On August 16, 1996, DEP officially notified Coastal that it had prepared and was ready to issue Permit no. 1281, but required Coastal to publish a Notice of Intent to Issue Permit. Permit no. 1281, according to the Intent to Issue, included the following special conditions:

a) Coastal shall conduct a magnetometer and side scan sonar survey;

b) Coastal shall complete comprehensive spill trajectory analyses;

c) Coastal shall complete an inventory of oil spill equipment to be stored on the drilling rig, service boats and at the Apalachicola staging location; and

d) Coastal shall prepare a hydrogen sulfide dispersion model with site specific runs.

29. On May 7, 1997, during the pendancy of this proceeding on DEP's Intent to Issue, Chapter 97-49, Laws of Florida, became law and provided authority to require additional surety for certain drilling operations in coastal waters. The new law provided that the Administration Commission would determine the amount of such surety at the recommendation of DEP. On August 11, 1997, DEP applied the new law to Permit no. 1281 and recommended the amount of the surety should be set at $4,249,637,886. On September 9, 1997, the Administration Commission voted and gave Notice and Order of Intent to Set Surety in the amount of $4,249,637,886 for Permit no. 1281.

30. In determining that Coastal was entitled to its

permit, DEP staff considered the three criteria found at Section 377.241, Florida Statutes. Those criteria are addressed separately from the surety requirement in the findings of fact, below.

Permit Criteria and Conditions

a) The nature, character and location of lands involved. (Section 377.241(1), Florida Statutes)

31. The proposed drill site is south of St. George Island, Franklin County, within the outer limits of the jurisdictional waters of the state in the Gulf of Mexico. At this site the ocean floor is below approximately 40 feet of water.

32. A photodocumentation survey provided by Coastal reveals the condition of the immediate site as mostly barren sand with very sparse animal and plant life, mostly echinoderms such as sand dollars and sea stars, and algae. Impact by a drilling rig set here on the ocean floor would be minimal due to low diversity and low density of biota, the majority of which is mobile and able to avoid direct impact.

33. The magnetometer and side scan sonar programs required by DEP and provided by Coastal reveal no geological hazards, deep-seated faults, archeological sites or anything out of the ordinary at the proposed drilling site.

34. The drilling rig and operation will have virtually no effect on the immediate site. The experience of offshore operations in Louisiana and elsewhere is that fishing is enhanced in the area by the attraction of fishes to the artificial reef created by a rig.

35. Section 377.241, Florida Statutes, which

describes the three criteria guiding the issuance of drilling permits was created in 1961. The preamble of the law found at Chapter 61-299, Laws of Florida, suggests that the legislative concern for the nature of the lands involved was that owners of lands subject to oil, gas and mineral rights should not be unduly burdened or restricted from developing homes, farms, commercial uses or other appropriate land uses. This intent plainly affects land-based drilling projects more than offshore projects such as this.

36. The closest shore to the site is St. George Island, to the north. Lands to the east, west and south are many miles away. St. George Island residents and business owners are sincerely worried about the specter of oil rigs on the horizon, though there is no evidence that the single rig that is the subject of this proceeding could be seen from any land.

37. The obvious threat to St. George and other sensitive barrier islands, to Apalachicola Bay (a special management area), to the world-renown beaches, and to the commercially and environmentally treasured lands along the Florida panhandle coast, would be from an oil spill.

38. The potential costs of a spill are addressed below in the assessment of an appropriate surety, but for the purposes of considering this first permit criteria, it is found that the chance of a damaging spill from drilling the proposed exploratory well is extremely remote.

39. Drilling operations consist of setting up a drilling rig, which is floated to the location and submerged, allowing the rig to rest on the sand bottom; driving a large diameter conductor pipe into the ground, thereby allowing all operations to be conducted within the conductor pipe; drilling the first shallow hole and setting the "surface casing" pipe; sending cement through the pipe and up the outside to

seal the pipe, to close the rock layers, and to serve as a base to control the well in the event of a blowout; and continuing to drill the hole until the total depth of the well is reached, when it will again be cased in the same manner with production casing. The rock cuttings are brought to the surface by circulating drilling fluids, also known as "mud", which are water-based solutions of natural materials; then the rock bits are screened and removed so the mud may continue to circulate within the closed system.

40. The risk of oil spills from exploratory oil and gas drilling operations is very small because of the redundant systems and multiple lines of defense against uncontrolled blowouts. The lines of defense include hydrostatic pressure control by the use of weighted drilling fluids, well control systems including redundant blowout preventors, a well control service company, and the use of trained and certified personnel. Most blowouts are gas, not oil, and most blowouts stop themselves by bridging within a few days.

41. The proposed Permit no. 1281 well is less likely to spill any oil because it will be a zero discharge well; the well will be drilled by one of the largest drilling contractors in the world, Nobel Drilling; the rig will be drilled with federally- certified crews trained in well control; the rig will be surrounded by a high seas oil fence with locks; there will be onsite oil spill equipment and personnel; there is redundant blowout equipment on this rig; and the environmental compliance officer will train all workers to observe proper procedures. The operations will be comparable to that of Getty Oil's exploration project in East Bay, which in the words of DEP's oil and gas section administrator, was "an absolutely first class operation. You could eat off the deck. Well, I wouldn't, but it looked clean enough." (transcript, p. 777)

42. The U.S. Department of Interior, Minerals

Management Service (MMS) maintains statistical data based on reports of accidents occurring on the outer continental shelf (OCS) resulting in oil spills greater than one barrel (42 gallons). MMS regulations require that oil and gas operators report orally and in writing all spills of oil and liquid pollutants to the MMS District Supervisor. Data from the reports are relied on by the industry, by scientists and by regulatory agencies. According to MMS data for the years 1971-1995, out of a total of 24,237 well starts, 999 barrels of crude oil and condensate were spilled from offshore wells under federal jurisdiction.

43. When oil is spilled on the water, natural weathering processes immediately begin to work on the oil: evaporation reduces the volume of the oil, with light oils evaporating quickly; bacteria literally begin eating the oil and oil products; sunlight degrades the oil; and the oil begins to dissolve and dissipate into the water. These natural processes are especially effective at this site because the oil involved would likely be a very light 50 API gravity oil, as is other Smackover oil in Florida; the climate is warm and the bacteria which eat the oil and oil products are plentiful in this region; the area receives much sunlight; and warmer water promotes the dissolution and dissipation of the oil into the water.

44. Oil is a naturally-occurring substance. Natural oil seeps in the Gulf of Mexico release large quantities of oil and gas into the sea that is weathered and dissipated as described above. The seeps, discovered through satellite photography, are estimated to produce as much as 120,000 barrels a year from vents in the continental shelf off the Louisiana coast.

b) The nature, type and extent of ownership of the applicant, including such matters as the length of time the applicant has owned the

rights claimed without having performed any of the exploratory operations so granted or authorized. (Section 377.241(2), Florida Statutes)

45. In 1941, the Florida Legislature enacted Chapter 20680, Laws of Florida, authorizing the Board of Trustees of the Internal Improvement Fund (Trustees) to negotiate, sell, and convey oil and gas leases on lands and water bottoms owned by the State of Florida. Pursuant to that law, Coastal's predecessor, Arnold Explorations, Inc., acquired three leases, numbers 224-A, 224-B and 248, encompassing the territorial waters of the state along the west coast, from Apalachicola to south of Naples, as well as Lake Okeechobee and other fresh water bodies.

46. The 50+ years' history of those leases is chronicled in volumes of legal documents and court opinions commencing, it appears, with a Florida Supreme Court opinion in Watson v. Holland, 20 So. 2d 388 (Fla. 1945), which upheld the leases against a challenge by then Attorney General J. Tom Watson.

47. Proposed Permit no. 1281 is within lease 224-A, which includes the northern portion of Coastal's off-shore lease area.

48. Coastal, alone and through arrangements with other oil companies, including Mobil Oil Corporation, conducted geologic and seismic studies to locate oil and other minerals covered by the leases. Coastal, also through joint venture arrangements with other companies, drilled some exploratory wells off the west coast of Florida; these did not produce oil and were, therefore, "dry" wells. Through the years Coastal has satisfied its obligations to pay annual rentals and perform certain minimum activity under its leases.

49. In 1976, Coastal settled federal litigation between Coastal, the Trustees and the Army of Corps of Engineers, by relinquishing its exploration rights to all but the most off-shore portion of its lease area (7.36-10.36 miles offshore). Coastal retained a "residual royalty" interest in the near shore area (coast to 4.36 miles off-shore) and surrendered altogether its interests in the middle portion. (See Coastal Petroleum v. Chiles, et al, 701 So. 2d 619 (Fla. 1st DCA 1997), which upheld denial of Coastal's inverse condemnation action based on the state's enactment of a statute prohibiting offshore oil and gas exploration in Coastal's royalty interest areas. This opinion provides an outline of the vicissitudes of Coastal's defense of its leases.)

50. Activity by Coastal over the past 50 years, through its partners and joint venturers, belies the Environmental Petitioners' claims that Coastal has "abandoned" oil exploration in favor of a more lucrative settlement or buy-out by the state (the "Greenmail" theory). For many of the 50 years, litigation has eclipsed oil, gas and mineral exploration in the vast leases. Not all of the litigation was initiated by Coastal and by all published reports none has been found to be frivolous.

> c) The proven or indicated likelihood of the presence of oil, gas or related minerals in such quantities as to warrant the exploration and extraction of such products on a commercially profitable basis. (Section 377.241(3), Florida Statutes)

51. Oil and gas exploration is a risky business. Depending on the area of the world, you may have a one in 10 chance, or one in 50 chance of hitting the right spot. If you finally hit, you must expect to pay for all of the prior misses. In the experience of Phillip Ware, the standard

industry expectation is a one in 10 chance in a frontier area such as this. Permit no. 1281 would be a "wildcat" well, that is, a well drilled outside of a producing field.

52. This third criterion has rarely, perhaps only once, been used by DEP to deny an application, as DEP interprets its requirement very liberally. If the statutory criteria intended the likelihood of the presence of oil to be better than 50 percent, every application would have to be denied.

53. From the statistics maintained by the agency, Ed Garrett determined a drilling success rate in wildcat wells throughout Florida has been about 2-3 percent. Some wells drilled in a producing field come up dry, even as close as one-half mile from a producing well.

54. When DEP, through Ed Garrett and its other staff reviewers, applied the third criterion to Coastal's application the agency considered wells to the north drilled into Smackover and Norphlet, productive formations found in the northern Gulf of Mexico and inland up into Arkansas, and it determined that the siting of proposed Permit no. 1281 was reasonable.

55. The "commercially profitable" prong of the criterion is also tricky, since fluctuating oil prices engendered by wholly unpredictable world events can result in a well that is valuable when it is first drilled becoming useless by the time production and transportation facilities are established. Coastal presented sufficient evidence of the anticipated commercial profitability of the well.

56. Reasonable, competent, credible geologists can disagree, as evidenced by the range of opinions presented by the experts in this proceeding, but all agree on one immutable principle: the only way we can determine

whether oil is present is to dig a hole.

57. Phillip Ware is a reasonable geologist, registered to practice geology in the State of Florida. His experience in the past 20 years has been as an employee and then president of Coastal. In the early years he operated as an oil scout and as an assistant to the vice-president, Joe Banks. In that capacity, and continuing to the present, he has monitored all relevant oil and gas activities in the area, reviewed oil and gas drilling logs, kept track of current drilling, including industry developments and rumors, and stayed current with publications and public data on oil, gas and mineral exploration.

58. In selecting the site for Coastal's application, Phillip Ware reviewed documents from the Florida Geologic Survey and elsewhere describing oil exploration wells drilled in state waters, including wells drilled by Coastal through its joint venturers, California Oil Company and Mobil. He reviewed many scholarly and scientific and industry publications; he reviewed available seismic studies as well as a map made by Joe Banks, who died in 1979. The contour lines drawn on Banks' map, as interpreted by Phillip Ware, show a promising geologic structure at the site of Permit no. 1281.

59. A geologic formation is a specific layer of rock large enough to be mapped over a large geographic area. Jurassic period Smackover and Norphlet formations have been the prolific source of oil in the Jay fields northwest of Permit no. 1281.

60. An embayment is a shallow restricted area of prehistoric sea where formations are deposited, in this case, the Smackover and Norphlet formations. The Apalachicola embayment, centered along the present Apalachicola River, has been studied extensively in the last 20 years and its

existence at the site of proposed Permit no. 1281 is the subject of substantial dispute between Coastal and the Environmental Petitioners in this proceeding.

61. After DEP issued its intent to issue the permit and the Environmental Petitioners filed their challenge raising the issue of the likelihood of finding oil, Coastal hired a series of experts who reviewed the same data considered by Phillip Ware, and other data, and derived their own opinions regarding the viability of the oil prospect.

62. Petroleum geologists describe three or four essentials for an oil field. The source rock, which is organically rich and subjected to heat over a long period, forms oil and gas. The reservoir rock may also be the source rock if there was no migration of the petroleum, but if the petroleum has migrated, the reservoir rock is its final resting place. The reservoir must have porosity and permeability to allow the petroleum to enter and move about. The structure, which may be part of the reservoir, is an upper level or trap which contains the oil. Cap rock or seal is what holds the petroleum within the structure, keeping it from escaping to the surface.

63. A structure or trap for the oil may be a geological fault or an anticline, when the cap has formed a dome shape which captures and holds the oil.

64. The process of determining whether these elements exist beneath the earth's surface, or in this case, below the ocean floor, requires the acquisition of data from prior wells. Even dry wells provide a wealth of information. Magnetic, seismic and gravity testing (called geophysical testing) also yields valuable data.

65. From the available data, geologists are able to extrapolate and map the subsurface of a given area. The

more data that is available, the more accurate is the map. Geophysical testing, however, is highly expensive, and prospects have been drilled without such site-specific tests, the interpretations of which can be subjective.

66. DEP staff geologists considered Phillip Ware's selected site as reasonable, based on their own conclusions that Smackover and Norphlet trends likely extended southeast through the Florida panhandle and into the area offshore of Franklin County. These conclusions are supported by the extensive evidence and testimony of Coastal's experts.

67. Charles Morrison gathered and reviewed all geophysical information available, chose the best of that information, had the information reprocessed using current computer methods, analyzed and correlated the information, did regional mapping, and then mapped the structures in the area. His work included identifying geologic faults, the interface of large blocks of the earth which have moved up, down or sideways, and which may also thereby create a trap for oil. He also mapped a large faulted structure or trap called an anticline, or dome, independently confirming the selection made by Mr. Ware, and he concluded that the structure was a good quality, drillable prospect.

68. Barry Faulkner, hired by Coastal to review its leases including Lease 224-A, is a professional geologist in Florida and was chief geologist for Getty Oil Company. In that position he reviewed large projects and was successful in his analysis; he evaluated hundreds of prospects including prospects in Florida; he has laid out well-tie and speculative seismic programs near and in Florida; he has prepared basin analyses for Florida in the past; he has reviewed all the relevant geologic literature; he has reviewed all relevant logs and records of the Bureau of Geology which keeps such records; he has reviewed all of Coastal's relevant records; he

has reviewed and considered Mr. Morrison's work in light of his own experience; and he performed many analyses on the above data and information. He independently concluded, based upon his analyses, that the Smackover was of sufficient thickness and that source, reservoir, seal and a trap exist in the Smackover and Norphlet geologic formations at the location of Permit no. 1281.

69. Barry Faulkner estimated the chances of source rock, reservoir rock, cap rock and trap as 80 percent, 60 percent, 80 percent and 70 percent, respectively, at the proposed well site, for a risk factor of 1 chance in 4 that the well would be productive. The Environmental Petitioners' less-thorough analysis yielded a much less optimistic estimate of 20 percent, 17 percent, 30 percent and 20 percent. Employing Barry Morrison's risk computation methodology to the deflated estimate would yield a risk factor below the 2-3 percent actual success rate supported by DEP's statistics, an example of the vast range of speculation but hardly sufficient to defeat this permit.

70. Before the 1943 Sunniland oil field was discovered (the first major field in Florida, in southwest Florida), hundreds of dry hole wells were drilled. Hundreds of dry holes were found before Florida's second major oil field, the 1969 Jay field, was established.

71. The fact that no leases were recently bid in federal off-shore waters and few oil and gas leases were entered in the last 10 years in the Apalachicola Basin is not competent evidence of any poor viability of Coastal's site. The regulatory climate, including federal and state moratoria on off-shore exploration activities, must also be considered an explanation for the inactivity.

Permit Conditions

72. Permit no. 1281, as described in DEP's intent to issue, includes 7 general permit conditions relating to compliance with other applicable laws and regulations, obtaining other required licenses or permits, notifying DEP's Oil and Gas Section in advance of drilling, and submitting required drilling logs and forms. These are standard conditions applied to any similar permit.

73. The proposed permit also includes these special permit conditions:

a) Prior to the commencement of drilling operations, Coastal shall conduct and submit to the Department for review and approval a magnetometer and side scan sonar survey.

b) Prior to the commencement of drilling operations, Coastal shall complete and submit for department review and approval comprehensive spill trajectory analyses.

c) Prior to the commencement of drilling operations, Coastal shall complete and submit to the Department for review and approval an inventory of oil spill equipment to be stored on the drilling rig, service boats, and at the Apalachicola staging location.

d) Coastal shall maintain zero discharge conditions at the drill rig site and shall utilize zero discharge equipment as described in the application package.

e) Prior to the commencement of drilling operations, Coastal shall submit to the Department for review and approval a hydrogen sulfide dispersion model with site-specific runs. In addition, Coastal shall incorporate the site-specific information and procedures stated in the January 15, 1993, letter into the Hydrogen Sulfide Contingency Plan submitted to the Department.

f) Prior to the commencement of drilling operations, Coastal shall publish in the Apalachicola Times and post in appropriate public facilities in the region an explanation of

the hydrogen sulfide warning signals and evacuation notices and procedures.

g) Coastal shall carry out bottom sampling according to the schedule described in the January 15, 1993, letter to the Department. This sampling is to detect accidental discharges of drilling muds. (CPC Exhibit No. 119)

74. Only special conditions a), b), c), and e) are still in controversy and Coastal claims that DEP does not have the authority to require these items. Under protest, each has been completed and submitted to DEP and are included in the record of this proceeding. (Inventory of equipment is CPC Exhibit no. 97; the side scan sonar survey is CPC Exhibit no. 185; the magnetometer survey is CPC Exhibit no. 186; and the hydrogen sulfide dispersion model with specific reins is CPC Exhibit no. 233.)

75. The agency had a sound rational basis to require each item. While in the beginning of the review process DEP imposed the items as part of the application submittal, it eventually adopted these requirements as permit conditions, as suggested by Phillip Ware in his January 15, 1993, response. (CPC Exhibit no. 87) The issue is moot, as DEP concludes in its proposed recommended order; Coastal has fulfilled the special conditions and Coastal needs only to formally submit the documents, with updates where necessary.

76. The Environmental Petitioners amended their petition to delete their claim that more seismic, specifically 3D seismic testing, should be conducted as a condition of the permit. No evidence suggests that such a condition is necessary. The site selected by Coastal for its permit application is at the intersection of two good quality seismic lines, interpreted by competent expert witnesses as contributing to their credible opinions that the site is a commercially-viable prospect.

77. There was some evidence that, as a condition for the Getty Oil drilling permit off-shore of Pensacola, drilling was prohibited during hurricane season. No party here has suggested or put on evidence of the need for this condition or any special condition other than those conditions addressed above.

The Surety

78. The most significant condition of the permit is the surety required by Section 377.2425(1), Florida Statutes, to assure that the operations under the permit will be ". . . conducted in a safe and environmentally compatible manner."

79. Prior to the 1997 adoption of Chapter 97-49, Laws of Florida, any applicant had the option of either supplying cash, a bond or letter of credit; or paying an annual fee to the Minerals Trust Fund. The 1997 legislature withdrew that second option for applicants for oil and gas exploration, drilling and production in coastal waters.

80. Specifically, Chapter 97-49 (Section 377.2425(1)(c), Florida Statutes) requires:

> (c) An applicant for a drilling or operating permit for operations planned in coastal waters that by their nature warrant greater surety shall provide surety only in accordance with paragraph (a), or similar proof of financial responsibility other than as provided in paragraph (b). For all such applications, including applications pending at the effective date of this act and notwithstanding the provisions of paragraph (b), the Governor and Cabinet in their capacity as the Administration Commission, at the recommendation of the Department of Environmental Protection, shall set a reasonable amount of surety

> required under this subsection. The surety amount shall be based on the projected cleanup costs and natural resources damages resulting from a maximum oil spill and adverse hydrographic and atmospheric conditions that would tend to transport the oil into environmentally sensitive areas, as determined by the Department of Environmental Protection.

(emphasis added)

81. Section 377.2425(1), Florida Statutes, as amended, denies permittees of offshore wells the option of using the Minerals Trust Fund under paragraph (1)(b). Instead, surety for wells drilled and operated in coastal waters must be covered by a surety provided as described in paragraph (1)(a) of the statute.

82. As discussed in the conclusions of law, below, Permit no. 1281 is a pending application to drill for oil and gas in coastal waters, and is subject to the surety requirement outlined in Chapter 97-49, Laws of Florida. DEP prepared and submitted its recommendation for a $4,249,637,886 surety amount to the Administration Commission. On September 9, 1997, the Administration Commission adopted the recommendation through its Notice of Intent To Set Surety.

83. The surety amount set under Chapter 97-49, Laws of Florida, must be based on the projected cleanup costs and natural resource damages of a "maximum oil spill." However, Chapter 97-49, Laws of Florida, contains no definition of that term.

84. Oil spills can occur in a number of different ways, depending upon the source (i.e., vessels, pipelines, storage tanks, and drilling or production facilities.)

85. While exceedingly rare, the most disastrous oil spills from drilling or production platforms are the result of a "blowout" from a variety of causes. A "blowout" is generally defined as an uncontrolled flow of formation fluids (oil, gas and water) up through the well bore hole, and exiting directly from the well into the atmosphere or ocean waters.

Anatomy of a Blowout

86. Oil and gas are contained within underground reservoirs at varying pressures which can amount to thousands of pounds per square inch (psi). Once a hole is drilled from the surface down into these reservoirs, the pressurized formation fluids will tend to "migrate" or escape under extremely high pressure. To counteract this pressure, weighted drilling mud is pumped into the well. The weight of the mud resting on top of the formation fluids forms a "hydrostatic head pressure" by pressing downward to contain the pressurized fluids.

87. However, if the drilling mud is not sufficiently weighted, or there is not enough drilling mud resting on top of the pressurized fluids, the drilling mud pressing downward becomes insufficient to counteract the pressure of the formation fluids. The result is termed a "kick." A "kick" is a threatened blowout, where insufficient hydrostatic head pressure allows the influx of formation fluids into the well. The kick, and subsequent blowout, can be a subtle intrusion; or in a serious event, drilling mud and formation fluids can be expelled from the well very violently and under considerable pressure.

88. The impending high pressure of a kick is usually detected, and can be safely siphoned off under controlled conditions by way of a complex system of plumbing and gauges termed a "christmas tree." If not

contained, blowouts can cause considerable damage to the drilling rig. In extreme cases, the drilling rig may collapse onto the well head, aggravating the spill and making it more difficult to halt the flow of oil from the well.

89. Blowouts are usually contained through the practice of well control. Initially, the well is monitored, and the drilling mud/formation fluid balance is carefully maintained to avoid a kick or to quickly control a kick. As a fallback, the well can be capped at the surface by use of blowout preventers or "BOPs."

90. BOPs and other devices used for well control have been standard equipment used by the petroleum industry worldwide for several decades. Located at the well head, BOPs come in a number of configurations (sheer rams, pipe rams, annular preventers, for example) and several different types are normally used in conjunction with one another as a redundant system.

91. Florida requires that BOPs be in place for all drilling and production facilities in the state as well as for those in federal waters. Permit no. 1281 requires Coastal Petroleum to use BOPs on its drilling platform.

92. The evidence and testimony adduced at trial demonstrate that widespread use of BOPs and other well control devices on a state, national and international scale has not completely eliminated the occurrence of blowouts. Blowouts, like most major accidents, are rare, but they do happen. Despite continually upgraded safety features, blowouts continue to occur worldwide, in the United States, and in the Gulf of Mexico as the result of human error or a chain of several errors or miscalculations, possibly combined with mechanical failures.

93. Such an event occurred in 1979 in the Gulf of

Mexico in Mexico's Campeche Bay, an area called the "Golden Lane" because of its extraordinary oil production. The well, Ixtoc I, was a single exploratory well, in Mexican waters and governed by Mexican regulations. Its blowout resulted in the most disastrous accidental oil spill in history.

94. The Ixtoc I well was drilled by the Mexican National Oil Company (Petroleos Mexicanos or "PEMEX"). The semisubmersible drilling rig was provided by SEDCO, Inc., of Dallas, Texas. Under a separate agreement, SEDCO also provided maintenance personnel, a rig superintendent and an assistant to advise PEMEX in the operation of the drilling rig.

95. The SEDCO 135 drilling rig was equipped with the standard BOP devices, including (1) pipe rams -- hydraulic shutters that snap shut around the drill pipe and prevent oil from flowing up in the space between the drill pipe and the casing (known as the annulus); (2) sheer rams -- hydraulic shutters that sheer through the drill pipe and block oil flowing up through the drill pipe; and (3) annular BOP -- which hydraulically inflates to further close off the annulus and seal off the space around the drill pipe.

96. On June 3, 1979, the Ixtoc I well experienced a kick while removing the drill pipe from the hole. The sudden pressure increase, in conjunction with a chain of human errors and miscalculations, quickly led to a blowout condition. The BOPs were activated, but were unable to contain the upward surge for formation fluids and the well blew out.

97. Oil and gas "gushed" from the drill pipe under extreme pressure (approximately 30 meters/100 feet into the air), and the associated petroleum fumes quickly led to a fire. All personnel were forced to abandon the drilling rig. Most of the equipment and machinery on the rig was destroyed,

and the drilling tower collapsed into the sea. When the drilling rig collapsed and sank to the sea floor it buckled the marine riser and damaged the BOP stack at the well head location on the bottom.

98. Initially, the Ixtoc I well discharged oil into the sea at an estimated rate of 30,000 barrels per day, although as much as half was consumed by the fire. This flow rate was gradually reduced during the course of the capping efforts after PEMEX contracted with several American and international firms trained in oil spill response. A massive cleanup effort was begun using firms from several counties, including the United States. However, the flow of oil from the Ixtoc well continued for nearly 295 days (almost 10 months), during which time repeated efforts were made to reduce and ultimately halt the flow. The total amount of oil discharged in the Ixtoc spill is estimated in a range between 120 and 170 million gallons. Oil reached and damaged the distant coast of Texas.

99. The extensive damage to the SEDCO 135 semisubmersible rig rendered it useless in capping the well, and ultimately two relief wells (Ixtoc 1A and Ixtoc 1B) were drilled to "kill" the well. A relief well consists of drilling a new hole down near the depth of the formation, and then intersecting the original (blownout) well from the side. Weighted drilling mud is then pumped down the relief well and into the original well in order to regain a balance between the drilling mud and the pressure of the formation, thereby halting the flow of oil up the original well.

100. A relief well can take as little as 30 days to drill, assuming no difficulties arise to slow the drilling operation. Under normal to adverse circumstances, a relief well may also take as long as three to four months to drill down to depth, locate the original well, and to intersect that well. Additionally, it will take time to locate another drilling

platform, transport said platform to the site of the blowout, and to set up that platform and prepare it for drilling operations. During the time needed to locate, transport and set up the rig, to drill the new well, to intersect the original well, and to pump weighted mud into the original well, oil may continue to flow out of the blownout well.

101. As described in paragraph 42, above, spills from offshore drilling operations in U.S. waters are exceedingly small. Equipment has been improved, personnel are better-trained and the activity is highly regulated and monitored by state and federal authorities.

The Property of Oil

102. Oil is a complex substance, actually comprised of several different types of components: volatiles, aromatics, resins and asphaltines. The volatiles include compounds such as benzene, toluene, ethylbenzene and xylene, which are highly toxic. The aromatics can include compounds with high and low molecular weights, and they, too, are highly toxic. Fortunately both volatiles and aromatics evaporate quickly and will not persist long in heavy concentrations once the oil s released into the water. The resins and asphaltines are the heavier compounds that persists much longer in the water.

103. Crude oils vary in their density. This density is usually a function of the proportion of lighter volatiles and aromatics versus heavier resins and asphaltines. The different densities of crude oil are measured on a API (American Petroleum Institute) Index, with lighter crude oils (those containing a larger portion of the volatile and aromatic compounds) registering higher on the API Index than the heavier, thicker crudes. Thus, the lighter crudes are more toxic, but a larger proportion of the compounds within these oils will evaporate and disburse more quickly. Consistent

with oil extracted from the target formations at the Jay field, any crude oil discovery at Coastal's proposed site is likely to be a very light crude with an API density between 40 and 50. In contrast, the oil spilled from Ixtoc I was between 29 and 33 degrees API.

104. Once spilled into the water, oil immediately begins a process of "weathering," whereby the chemical and physical properties of the oil are altered. The more toxic aromatic and volatile compounds quickly begin to evaporate. As much as 50 percent of the mass of the oil may be lost through evaporation into the atmosphere and dissolution into the water column within the first 48 hours.

105. At the same time, the oil emulsifies by mixing with the surrounding water. This forms an oil/water mix called "emulsion" or "mousse" which is thicker and stickier. In this emulsified mixture of oil and water, the spill can actually grow to 3 or 4 times its original mass, and can persist for a much longer period of time. As the oil emulsifies, the evaporation and dissolution of the volatile and aromatic toxic compounds is slowed. This emulsion remains potentially toxic through direct contact and ingestion, but primarily injures by smothering or through long-term exposure to organisms.

The Department's Estimate of Natural Resource Damage

106. In calculating the projected natural resource damage portion of its recommendation, DEP utilized the natural resource damage compensation schedule (the Formula) found at Section 376.121, Florida Statutes. The Formula was adopted by the Florida legislature after extensive collaboration between DEP and representatives of the petroleum industry. The Formula does not calculate projected cleanup costs. The Formula is used to assess damage after an actual oil spill or other pollution event and,

with the exception of the Coastal permit case, has never been used to estimate costs prior to an actual spill event.

107. The Formula requires the input of several factors in order to compute natural resource damages. These factors are: location of the discharge factor (designed as "L"), [Section 376.121(5)(a)1, Florida Statutes]; special management area factor (designated as "SMA"), [Section 376.121(5)(a)2, Florida Statutes]; pollutant category factor (designated as "PC"), [Section 376.121(5)(a)3, Florida Statutes]; habitat area factor (designated as "A"), [Section 376.121(5)(a)4, Florida Statutes]; volume of the discharge (designated as "V"), [Section 376.121(2)(a), Florida Statutes]; the deaths of threatened or endangered species (designated as "ETS"), [Section 376.121(6), Florida Statutes]; a base value of $1 per gallon of pollutant discharged (designated as "B"), [Section 376.121(4)(a), Florida Statutes]; and the cost of conducting a damage assessment as determine by DEP (designated as "DA"), [Section 376.121(4)(d), Florida Statutes].

108. Under the Formula, natural resource damages are compensated as follows:

> (a) The amount of compensation assessed under this schedule is calculated by: multiplying $1 per gallon . . .by the number [of gallons discharged], times the location of the discharge factor, times the special management area factor.
> (b) Added to the amount obtained in paragraph (a) is the value of the observable natural resource damage, which is calculated by multiplying the areal or linear coverage of impacted habitat by the corresponding habitat factor, times the special management factor.
> (c) The sum of paragraphs (a) and (b) is then multiplied by the pollutant category factor.
> (d) The final damage assessment figure is the sum of

the amount calculated in paragraph (c) plus the compensation for death of endangered or threatened species, plus the cost of conducting the damage assessment as determined by the department. Section 376.121(4), Florida Statutes.

Expressed mathematically, the Formula is represented as: {(B)(V)(L)(SMA)+(A)(SMA)} (PC)+(ETS)+(DA)

109. Utilizing the Formula to project damages from a hypothetical spill requires a series of assumptions in order to derive the variables described above; those variables are then factored in the equation.

110. The Formula requires a pollutant factor. Section 376.121(2)(b), Florida Statutes, categorizes the types of pollutants involved, and assigns a multiplier to each category of pollutant based on the severity each can have on the environment. The toxicity, dispersibility, solubility and persistence in the environment are all factors taken into account by the legislature in categorizing pollutants and assigning a multiplier to each. Section 376.121(2)(b), Florida Statutes.

111. Crude oil is contained within Category 2, along with waste oils, lubricating oils, tars and asphalts. Section 376.121(2)(b), Florida Statutes. The Formula does not distinguish between light, medium or heavy crudes (those with high, medium or low API density numbers), but instead includes all crudes within Category 2. Section 376.121(2)(b), Florida Statutes. Those pollutants listed in Category 2, including crude oils, receive a multiplier of 4 when factored into the Formula. Section 376.121(2)(a)3., Florida Statutes.

112. To derive the volume or "V" of the Formula, the actual amount of oil that is discharged directly into the

water is used. The volume variable under the formula is not adjusted to consider evaporation, emulsification, dispersion or cleanup in coming up with the "V" used in the equation. The "raw" volume is used. The weathering process undergone by the pollutant is instead accounted for in calculating the amount or area of habitat injured by the pollutant or the "A" variable in the Formula. Section 376.121(2)(b), Florida Statutes.

113. Relating the Formula to Chapter 97-49, Laws of Florida, the volume or "V" must represent a "maximum oil spill." DEP considered several different methods for deriving the volume of the "maximum oil spill," including reviewing area oil spill contingency Plans and other sources for similar terminology. "Maximum Oil Spill" is not a term used in the industry or previously by regulatory agencies.

114. DEP ultimately settled on basing its spill volume on the Ixtoc I blowout described above, utilizing 150 million gallons (a mid-range between the estimated 120 and 170 gallons spilled over time by Ixtoc I) for a total of approximately 3.5 million barrels.

115. In deriving the habitat factor (A) to plug into the Formula, it was necessary for DEP to assume a spill boundary -- the total area within which some resources would be affected by the spilled oil. In its recommendation to the Administration Commission, DEP identified a spill boundary extending from Gulf County and east and south to the Hernando/Pasco county line -- a distance of 222.8 miles. The counties included within this area of potential impact were: Gulf, Franklin, Wakulla, Jefferson, Taylor, Dixie, Levy, Citrus and Hernando Counties. Conjecture that the spill would flow primarily west, rather than east, resulted in less damage and therefore less than the statutory "maximum."

116. The Department relied on a number of sources in deriving the spill boundary for its "maximum oil spill" under the statute. Initially, the Department reviewed hypothetical spill trajectory models prepared in conjunction with proposed oil and gas leasing in federal waters off southeast Florida. As with the spill volume, the Department rejected the use of a hypothetical model and instead referred, in part, to data from past oil spills.

117. On March 24, 1989, the oil tanker Exxon Valdez ran aground, spilling 11.2 million gallons of crude oil into Prince Williams Sound, Alaska. Containment was highly effective for the first three days, but when the winds and seas increased with a storm event, the oil was blown beyond any hope of containment. The oil traveled on a 70-mile trajectory. Field surveys identified 790 miles of shoreline within Prince Williams Sound which received oil, over 200 of which were classified as heavily oiled. Additionally, more than 2400 miles of shoreline in the Kenai Peninsula/Kodiak Island region were found to be oiled.

118. The Department also relied on data submitted by Coastal Petroleum as part of the application for Permit no. 1281. In particular, the Department referred to Coastal's November 23, 1992, and January 15, 1993, submittals. In its November 23, 1992, submittal, Coastal evaluated the potential impacts of an oil spill, confining their search to a specifically identified area between St. Joseph Bay in Gulf County to Anclote Key in Hernando County. In its January 15, 1993, submittal Coastal, then conducted an economic analysis of these same areas. In that analysis, the Gulf, Franklin and Wakulla County area is designated as the "primary impact area" while the remaining 15 counties to the east and west are designated as "secondary impact areas."

119. In deriving the habitat areas within DEP's spill boundary, the Florida Marine Research Institute, a bureau of

the agency, was used. Using a comprehensive Florida Marine spill Analysis System (a subset of the Marine Resource Geographic Information System) database, acreages for habitat and linear beach were provided. The compensations schedule for various forms of habitat is found in Section 376.121(5)(a)4., Florida Statutes.

120. In computing the projected habitat coverages (A) within the defined spill boundary, DEP did not assume that the oil would damage or destroy 100 percent of all habitat types within this boundary. Rather, the agency accounted for evaporation and dissolution of the oil, and assumed some cleanup efforts would be underway.

121. For those habitats that are principally submerged for the majority of the time (such as seagrasses) only 1 percent of those resources within the spill boundary were assumed to suffer damage. DEP reasoned that the oil would float over top of these submerged habitats. Only a very small percentage of seagrasses in shallow water would be impacted by oil. This would typically occur during low tide, or by oil that has begun to settle into the water column.

122. For emergent habitats that are located along the shoreline or within the intertidal zone, DEP assumed a five-times greater possibility of exposure to oil. Thus, for habitats such as saltmarsh, mangrove and oyster reef, it was assumed that the maximum oil spill would damage 5 percent of the total area of these resources.

123. Sandy beach habitat, by virtue of its location relative to the well and within the intertidal zone, was found to be at much greater risk. For that reason, the agency assumed damage to 25 percent of the linear area of sandy beach within the spill boundary.

124. These same assumptions, with one notable

exception, were originally used in calculating the previous two surety amounts prior to the passage of Chapter 97-49, Laws of Florida. The notable exception was for sandy beach. In the most current surety calculation, coverage of sandy beach was reduced from 50 percent down to 25 percent to reflect the general absence of that environment throughout much of the spill boundary area.

125. In computing the projected natural resource damages, the Formula treats natural resource damages differently when they occur within a special management area. Those resources damaged within a special management area are multiplied by an additional special management area factor (SMA). Section 376.121(5)(a)2., Florida Statutes. Special management areas are defined by statute as "areas designated because of their unique habitats; living resources; recreational use; aesthetic importances; and other ecological, educational, consumptive, intrinsic, scientific, and economic values." Section 376.121(2)(c)2., Florida Statutes. Special management areas include: state parks; recreation areas; national parks, seashores, estuarine research reserves, marine sanctuaries, wildlife refuges, and national estuary program water bodies; state aquatic preserves and reserves; classified shellfish harvesting area; areas of critical state concern; federally designated critical habitat for endangered or threatened species; and outstanding Florida waters. Section 376.121(2)(c)2, Florida Statutes.

126. Most of the area in question is within some form of special management area as defined by statute. DEP's recommendation assumed that the 1 percent, 5 percent and 25 percent of the overall habitats damaged by the maximum oil spill would be within any one of these several special management areas.

127. The Formula also requires a location of discharge factor. Section 376.121(5)(a)1, Florida Statutes.

Under the statute, the location factor is either 8 (representing inshore discharges); 5 (representing nearshore discharges) or 1 (representing offshore discharges). Section 376.121(5)(a)1.a., Florida Statutes. Since the proposed well and origin of the discharge is an offshore well located 9 miles off the coast, a location of the discharge factor of 1 was used.

128. The Formula also includes a factor for the death of any endangered or threatened species (ETS). Compensation for the death of any animal designated as an endangered species is $10,000 per animal, while each threatened species killed is compensated at $5,000 per animal. Section 376.121(6), Florida Statutes. For the purposes of DEP's surety recommendation, no endangered or threatened species were presumed killed and no specific evidence was provided by any party to determine any better estimate for this factor.

129. The Department assumed $10,000 administrative costs for the final factor in the Formula (DA) described in paragraph 107, above.

Coastal's Methodology for
Projecting Natural Resource Damages

130. Dr. Deborah French was qualified as an expert in oil spill events. Since 1985 she has been performing oil spill modeling and working on models to be used for calculating natural resource damage assessments for a variety of clients, including the U.S. Department of Interior (DOI) and the National Oceanic and Atmospheric Administration (NOAA). She has also worked on environmental impact assessments and is widely published.

131. Dr. French prepared Coastal's "Oil Spill Trajectories and Analysis of Maximum Credible Natural

Resources Damages", having already been involved in developing the computerized system for natural resources damage assessments under contract with DOI.

132. Dr. French's model is widely used throughout the world by governments and private industry to predict the movement of oil on water and to the shore. The model has been validated by comparison with numerous actual oil spills and is a reliable and reasonable way to determine which habitats could be damaged or require cleanup because of a hypothetical oil spill.

133. The model takes into account relevant data of various kinds to predict the movement and fate of oil spilled on the water, including the precise location, the flow rate of the well, the duration of the flow, the characteristics of the oil, the wind record, the record of water currents, a digitized geographic map including water depths, and the digitized types and location of the habitats in the area. Dr. French utilized the precise location of Permit no. 1281. Dr. French used two flow rates for the well, a "maximum probable" flow rate of 1,654 barrels per day and in the event it were determined to be applicable, a "worst case" flow rate of 5,948 barrels per day.

134. These flow rates are the average and highest initial flow rates of the 122 producing wells in the Jay oil field from the Smackover geologic formation, the target of the Permit no. 1281 well.[2] Although these flow rates are not blowout rates (and none of these wells has blown), it is reasonable and reliable to use them as a predicted rate because the Jay oil field is a large sample of the target Smackover formation in Florida; the Jay Smackover flow rates are flow rates after acid stimulation and not the two or three times smaller unstimulated natural rates; and DEP's own expert, Ed Gambrell, admitted that he would expect that if a blowout occurred it would be two or three times the

flowing rate. Thus, it is likely the stimulated figures represent a blowout condition from the same well in the unstimulated natural condition it would be in at the time of drilling.

135. DEP's choice of the volume of Ixtoc as the basis for the agency's calculation is neither reasonable nor reliable because of the unique characteristics of that well: its extraordinary rate of flow; its extraordinary duration of flow; the fact it was located in Mexican waters, governed by Mexican regulations and attitudes; and it was at a time before the industry became more sophisticated and highly regulated. The Ixtoc well was drilled into one of the most prolific areas in the world, that is, "the Golden Lane," an area noted for unusually high flow rates. One well there flowed 455,000 barrels per day, and the Ixtoc well itself was estimated to flow 30,000 barrels per day. Initial production rates there are some of the highest in the world. In contrast, the Smackover geologic formation in Florida is far less productive, with wells averaging less than 2,000 barrels a day of flow after stimulation to enhance their even lower unstimulated natural flow rates. Dr. Schmidt, who selected the Ixtoc well volume, admitted he did not expect another "Golden Lane" off Apalachicola.

136. In addition to flow rate, duration is also important to the volume of a spill. The Ixtoc well flowed for 295 days before it was brought under control. Other wells have never flowed for such a duration before being brought under control. In fact, even without being brought under control, most wells bridge off by themselves within a few days.

137. Dr. French used two durations of flow: a "maximum probable" duration of 5 days and, in the event it were applicable, a "worst case" duration of 21 days. Her model is conservative, as it assumes no cleanup, burning or

other diminution of the spill amount.

138. Within 24 hours, more than 50,000 barrels a day of oil spill recovery capacity could be on site and the HOSS barge system, which can recover 18,000 barrels a day by itself, could be deployed in a few hours. Conservatively, the well would be brought under control in 3 weeks in the unlikely event it were to blowout. There is a very large capability in and near Florida for cleanup and capture in 2 days; the use of 5 days allows for weather problems as well as setup of the HOSS barge, the use of 21 days is an outside limit worst-case scenario.

139. The Department attempted to show a longer duration should be used based on a possibility that a relief well would be required to kill the flow. There has never been such a case in the U.S. Gulf of Mexico offshore areas in the last fifteen years in thousands of wells. The only such case pointed to, in Louisiana, involved a very complex multiple well production platform.

140. The maximum probable rate of 1,654 barrels per day multiplied by the maximum probable duration of 5 days, or 8,270 barrels, is a maximum probable. It would be reasonable and reliable to use this as the maximum oil spill for calculating the amount of the surety because this exceeds by more than eight times the total spillage from all exploratory wells drilled in the United States Gulf of Mexico federal waters in the last 25 years. If the worst case situation were determined to be proper, the worst case rate of 5,948 barrels per day multiplied by the worst case duration of 21 days, or 124,908 barrels, is the volume of the worst case oil spill. No well in the history of the United States oil production has ever spilled more oil than this volume.

141. Dr. French utilized the characteristics of a South Louisiana API gravity 35 crude oil, but the expected

oil from the 45-50 API gravity oil from the Smackover geologic formation is a much lighter oil. Dr. French's use of this medium crude oil makes her conclusions very conservative because a greater percentage of the lighter oil will quickly evaporate. Dr. French used the wind record gathered by NOAA at a buoy near St. George Island, which is reasonable and reliable because these are actual winds recorded in the area by the federal government. Dr. French used water currents calculated from recorded winds, because there is no recorded current information. Currents in this area of the Gulf of Mexico are an insignificant factor. She used a hydrodynamic model provided by Dr. Wilton Sturges at Florida State University (FSU) and from that was able to obtain data on currents for the same area and time as the wind data for the analysis.

142. By using the above factors, Dr. French used a maximum oil spill and the most adverse hydrographic and atmospheric conditions in her analyses which would be most likely to damage habitats in the area.

143. Dr. French used depth data maintained and distributed by the U.S. Department of Commerce, National Geophysical Data Center. Finally, Dr. French used the digitized types and location of the habitats in the area she obtained from Dr. Jacqueline Michel, which maps and data were prepared for and accepted by the State of Florida and used by DEP in calculating its own habitat damages.

144. With this data for the maximum probable and worst case scenarios, Dr. French ran 200 trajectory analyses for each of five times of the year from the wind record. Dr. French used this stochastic mode (trajectory analysis) to determine the potential or probability of any spot in the entire area to be touched by oil in any amount for each time of the year. This also allowed her to determine the transport time to any area and her analysis revealed two things with

particular relevance: spills in June were the worst case in transporting oil toward shore and sensitive habitats; and that by the time oil got to Lighthouse Point to the east, the very light oil had weathered for eight days and what remained was in a nontoxic state.

145. From the wind record Dr. French identified the most adverse winds for each scenario which would transport oil the fastest to shore so as to be least weathered and most toxic to maximize the habitat that could be damaged. The historic winds that would transport the oil the fastest to shore occurred beginning June 1, 1989, and were 12 knots to the northeast for the worst case scenario and to the north for the maximum credible scenario. This choice of wind was reasonable and reliable to use to maximize the habitat that could be damaged by each scenario because although winds in excess of this have occurred, winds greater than 12 knots entrain the oil and reduce its impact on habitats. The effects of high winds, including hurricanes, during a spill event is to hinder response efforts. Hurricanes themselves can have a beneficial effect of scrubbing clean the shoreline.

146. Having identified the events with a maximum potential for damage to habitats near the Permit no. 1281 location, Dr. French ran specific data for each scenario to determine the actual habitat that would be damaged from the hypothetical spill. The runs of these two scenarios, that is, maximum credible and worst cases, identified the habitats that would be affected by the hypothetical spill.

147. Dr. French utilized her model and analyses in deriving compensation estimates under the Florida Natural Resource Damage Assessment. She found, however, that the Formula is not clear on the appropriate threshold thickness where a habitat is considered oiled enough to be injured. The Formula, since it applies to damage assessment after a spill, would rely on field observations of actual, rather than

forecasted, impacts to habitats.

148. Based on scientific literature describing field observations after oil spills, Dr. French and her firm developed a model for federal natural resource damage assessments. That model includes a 14 millimeter threshold. DEP used a
1 millimeter threshold for its analysis, so Dr. French included runs of both thresholds in her application of the Florida NRDA compensation schedule. She opined, however, that a 1 millimeter oil slick would unlikely significantly injure a shoreline habitat or a submerged habitat, since in the latter habitat, exposure to oil is from entrained or dissolved oil in the water under the slicks.

149. The results obtained by Dr. French under the scenarios applying the direction of spill likely to oil and effect the greatest amount of shoreline and habitat are as follows:

	NE 21 days (worst case)	NE 5 days (maximum credible)
> 14 millimeter	$43,905,858	$ 2,781,318
> 1 millimeter	$86,510,064	$ 2,930,214

Projected Cleanup Costs

150. In addition to projected natural resource damage, Chapter 97-49, Laws of Florida, requires the surety amount recommended by DEP and adopted by the Administration Commission to include projected cleanup costs.

151. In developing projected cleanup costs for the "maximum oil spill" DEP initially contacted several industry

trade groups and corporations experienced in oil spill cleanups. The unanimous response was that no two spills are alike. There are so many variables to take into account that it is impossible to find an "average" cost for cleanup of an oil spill.

152. The agency then looked to the recent experience of the 1993 Tampa Oil Spill, resulting from a collision of barges and a tanker, spilling heavy, persistent, no. 6 fuel oil. Specifically, DEP looked to what it had: an unaudited reimbursement claim for cleanup submitted by the responsible party in the amount of $53,000,000. The actual amount spent on cleanup of the Tampa Bay Oil Spill may be over $70,000,000. However, since the reimbursement claim had not yet been audited to verify the amounts claimed, DEP conservatively used the lower number.

153. The agency then divided the smaller number ($53,000,000) by 14, the number of miles of affected shoreline. Then, again in light of the uncertainty as to what might have been included in the reimbursement claim, the Department further reduced the amount by nearly a third, resulting in $2.5 million per mile of shore to be cleaned. That amount, when multiplied by the 222.8 miles of linear coast within DEP's spill boundary for a Coastal spill, produced a figure of $557,000,000. That calculation excluded an additional 20 miles of seawalls that required pressure cleaning as a consequence of the Tampa spill.

154. In determining the extent of shoreline requiring cleanup, DEP utilized a linear coastline measurement, rather than measuring the sinuosity of the shoreline. This linear coastline measurement thus conservatively excluded additional miles attributable to rivers, inlets, bays and streams. In contrast, Dr. French's trajectory model predicts real shoreline effects.

155. The DEP cleanup estimate, like its damage estimate, is flawed and unreliable. It is based on a unique event with little in common with the circumstances surrounding any possible Coastal well blow out. Cleanup costs are highly related to the type of oil spilled, the geography of the area in which it is spilled, and the rate of the spill, among other factors.

156. The Tampa Bay spill was a complex event involving a collision of three ships and a fire. The oil released was very heavy, with an API gravity of 10.5, a sticky viscous, coating substance which persists on the shoreline. Often no shoreline cleanup is attempted for lighter oils as they tend to be washed off by the tides and small storms, and mechanical interference often exacerbates the damage.

157. The DEP estimate of shoreline length is based, not on
an actual trajectory study, but on a misunderstanding of earlier Coastal submittals and a "thumbnail guess."

158. Jacqueline Michel was Coastal's expert regarding cleanup costs. She has a Bachelor's degree in geology, a Masters in hydrogeology, and a Ph.D. in geochemistry, and she has been involved in oil spill cleanup and response and assessment since 1976, including Ixtoc's effect in South Texas, the Exxon Valdez, and the Tampa Bay spill referenced above. She and her company are part of a government response team under contract with the federal government, and she is involved in about 50 oil spills a year, from various causes, all over the world.

159. Dr. Michel's company has developed a digitized data base creating an atlas of oil sensitive habitats, biological resources and human resources that might be sensitive to an oil spill. Called Environmental Sensitivity Index (ESI)

maps, these data collections are obtained from existing agencies with whom the company works closely to assure that the collections are accurate and usable. One such agency is the Florida Marine Research Institute (FMRI), within DEP.

160. Dr. Michel's cleanup costs assessment for Coastal included these steps:

1. Obtain information on the duration and coverage of oil slicks on water and the areal and lineal extent of shoreline oiling by habitat type from the trajectory modeling work by Applied Science Associates, Inc. (ASA, 1997)(Dr. French)
2. Obtain unit costs for labor, equipment, supplies, etc. from published summaries (Etkin, 1994), spill response contractors, and other vendors.
3. Derive level of effort estimates for different types of response and cleanup efforts, from documentation of previous spills and guidelines provided by spill response contractors in the Gulf of Mexico.
4. Use unit costs and level of effort to estimate daily costs for different components of a response and cleanup operation. Components included:
    a. On-water recovery (both offshore and nearshore skimming operations);
    b. Shore-based support for skimming operations and handling/disposal of recovered liquids;
    c. Commercial aircraft support for overflights;
    d. Shoreline cleanup operations, including bird rescue and cleaning;
    e. Federal agencies' cost for response;
        -U.S. Coast Guard (including the National Strike Force)
        -U.S. Navy

-National Oceanic and Atmospheric Administration
-Department of Interior
-U.S. Environmental Protection Agency

f. State agencies' cost for response
g. Disposal of oily wastes

5. Develop total costs for the two release scenarios; and

6. Compile recent oil spill costs for representative spills and develop tables on costs/gallon spilled.

(Coastal Exhibit no. 394)

161. Dr. Michel's estimate included cleanup of oil with a thickness of 1 millimeter or greater since this thickness is assumed to generate sheens that respond to sorbents and sorbent booms in marshes and manual or mechanical removal from beaches. No oil recovery off-shore was considered in the analysis of the amount of shoreline contamination, resulting in a conservative, credible estimate.

162. Based on trajectory data provided by Dr. French and the resultant "worst case" and "maximum probable" scenarios Dr. Michel determined cleanup costs of $137,968,507 (worst case) and $19,713.046 (maximum probable).

A "Reasonable" Surety

163. Returning to the Formula in Chapter 376.121, Florida Statutes, the most significant difference between DEP's methodology and Coastal's is the assignment of a value for volume.

164. In spite of its being a real life example of a maximum oil spill, Ixtoc I is not a reasonable source for

deriving the volume of a maximum oil spill at the proposed permit site. That "it happened" does not mean that it will happen here. The geology and geography of the site, the level of regulatory scrutiny, and the quality of staff and equipment proposed by the applicant and required by the agency, must be considered to determine a "reasonable" surety specific to this single well-drilling permit.

165. Volume in Dr. French's application of the formula was derived from the most relevant data available: wells drilled in the target Smackover formation 140 miles to the northwest. While the "maximum probable" scenario she adopted is plainly more likely, her "worst case" scenario better effectuates the legislature's directive that the surety be based on a "maximum oil spill."

166. For reasons discussed above, Dr. French's trajectory method is credited and best reflects the "adverse hydrographic and atmospheric conditions that would tend to transport the oil into environmentally sensitive areas." Her trajectory established that oil from a 21-day worst case spill would reach almost the same distances as DEP's projection, but she reasonably factored the density of the oil and determined that its toxicity, and damage potential would be mitigated by the time most of the shoreline was oiled.

167. It is highly unlikely that injury to most habitat will occur with a threshold thickness of less than 14 millimeter of oil, but competent evidence of the sensitivity of nursery and breeding habitat and of organisms related to early stages of the life cycle of shellfish and other creatures, supports adopting the more conservative scenario, with 1 millimeter thickness of oil.

168. Appropriately, and consistent with DEP's application of the formula, Dr. French considered a factor of 2 for "special management area" since a hypothetical

discharge will originate outside of a special management area but will impact natural resources within the Apalachicola Bay special management area.

169. Dr. French, like DEP, considered a factor of 4 for the category of pollutant (category 2, in the statute includes crude oil). The Formula does not refine categories of crude into light or heavy API density, but if it did, the light crude anticipated from the source at issue would likely merit a factor of 2 or 3. In her trajectory model, Dr. French assumed the density of Louisiana crude, a heavier, less volatile oil, rendering her results as to area coverage very conservative.

170. In summary, the most reasonable, best-supported estimate of natural resource damages resulting from a "maximum oil spill and adverse hydrographic and atmospheric conditions that would tend to transport the oil into environmentally sensitive areas" is $86,510,064. (Coastal Exhibit no. 391, tables 5.6 and 5.12)

171. $86,510,064, added to Dr. Michel's "worst case" response and cleanup estimate of $137,968,507, plus $10,000 DEP administrative costs, results in a reasonable surety amount of $224,488,571.

Costs and Attorney's Fees

172. Both Coastal and the Environmental Petitioners have included requests for costs and attorney's fees in their respective petitions. This lengthy proceeding, competently and diligently tried by all parties, yields no evidence of bad faith or improper purpose or any other basis for award of fees cognizable under Chapter 120.

CONCLUSIONS OF LAW

173. The Division of Administrative Hearings has jurisdiction in this proceeding pursuant to sections 120.569 and 120.57(1), Florida Statutes.

174. Coastal has an outstanding motion to dismiss the petition of the Environmental Petitioners on the ground that they lack standing. Specifically, Coastal contends that these parties were on notice of DEP's original intent to deny the drilling application for lack of a sufficient bond. Coastal's challenge to that decision to deny was the proceeding described in Findings of Fact paragraphs 23-26, above. Coastal argues that the Environmental Petitioners could have, and should have participated in that proceeding, and having failed to do so are now precluded from participating in the ongoing dispute.

175. There is evidence, as found above, that Sierra Club and Florida Audubon Society had notice of the pending application, but no evidence that Florida Wildlife Federation had notice. The "clear point of entry" for that party was not available until after DEP's notice of intent to grant the permit was issued in August 1996.

176. That notice of intent and the requirement imposed by DEP pursuant to its Rule 62C-103.150(2), Florida Administrative Code, that Coastal publish notice of the intent to issue, was the subject of Coastal's interlocutory appeal dated August 27, 1996. The briefs and Coastal's petition have been considered though official recognition (Transcript, vol. I, p. 25) and as Environmental Petitioners' Exhibit no. 128.

177. On February 10, 1997, the First District Court of Appeal denied Coastal's Petition; on March 3, 1997, it denied Coastal's Motion for Clarification. It appears that the

appellate court has disposed of the issue. If it has not, however, disposed of the issue on its merits, there is good and adequate basis as argued in the Environmental Petitioner's briefs in the appeal to now deny Coastal's Motion to Dismiss. The motion is thus DENIED.

178. DEP has authority to issue permits to drill wells for oil and gas pursuant to Chapters 403 and 377, Florida Statutes, and its rules found at Chapters 62C-25 through 62C-30, Florida Administrative Code. Section 377.22, Florida Statutes, provides, in pertinent part:

> 377.22 Rules, regulations, and orders.–
>
> . . .
>
> (2) The department shall adopt such rules and regulations, and shall issue such orders, governing all phases of the exploration, drilling, and production of oil, gas, or other petroleum products in the state, including exploration, drilling, and production in the offshore waters of the state as may be necessary for the proper administration and enforcement of this chapter. Such rules, regulations, and orders shall ensure that all precautions are taken to prevent the spillage of oil or any other pollutant in all phases of the drilling for, and extracting of, oil, gas, or other petroleum products. The department shall revise such rules and regulations from time to time as may be necessary for the proper administration and enforcement of this chapter. Rules, regulations, and orders promulgated in accordance with this section shall be for, but shall not be limited to, the following purposes:
>
> (a) To require the drilling, casing, and plugging of wells to be done in such a manner as to prevent the pollution of the fresh, salt, or brackish waters or the lands of the state.
>
> (b) To prevent the alteration of the sheet flow of

water in any area.

(c) To require that appropriate safety equipment be installed to minimize the possibility of an escape of oil or other petroleum products in the event of accident, human error, or a natural disaster during drilling, casing, or plugging of any well and during extraction operations.

(d) To require the drilling, casing, and plugging of wells to be done in such a manner as to prevent the escape of oil or other petroleum products from one stratum to another.

(e) To prevent the intrusion of water into an oil or gas stratum from a separate stratum, except as provided by rules of the division relating to the injection of water for proper reservoir conservation and brine disposal.

(f) To require a reasonable bond, or other form of security acceptable to the department, conditioned upon the performance of the duty to plug properly each dry and abandoned well and the full and complete restoration by the applicant of the area over which geophysical exploration, drilling, or production is conducted to the similar contour and general condition in existence prior to such operation.

(g) To require and carry out a reasonable program of monitoring or inspection of all drilling operations or producing wells, including regular inspections by division personnel.

(h) To require the making of reports showing the location of all oil and gas wells; the making and filing of logs; the taking and filing of directional surveys; the filing of electrical, sonic, radioactive, and mechanical logs of oil and gas wells; if taken, the saving of cutting and cores, the cuts of which shall be given to the Bureau of Geology; and the making of reports with respect to drilling and production records. However, such information, or any part

thereof, at the request of the operator, shall be exempt from the provisions of s. 119.07(1) and held confidential by the division for a period of 1 year after the completion of a well.

(i) To prevent wells from being drilled, operated, or produced in such a manner as to cause injury to neighboring leases or property.

(j) To prevent the drowning by water of any stratum, or part thereof, capable of producing oil or gas in paying quantities and to prevent the premature and irregular encroachment of water which reduces, or tends to reduce, the total ultimate recovery of oil or gas from any pool.

(k) To require the operation of wells with efficient gas-oil ratio, and to fix such ratios.

(l) To prevent "blowouts," "caving," and "seepage," in the sense that conditions indicated by such terms are generally understood in the oil and gas business.

(m) To prevent fires.

(n) To identify the ownership of all oil or gas wells, producing leases, refineries, tanks, plants, structures, and storage and transportation equipment and facilities.

(o) To regulate the "shooting," perforating and chemical treatment of wells.

(p) To regulate secondary recovery methods, including the introduction of gas, air, water, or other substance into producing formations.

(q) To regulate gas cycling operations.

(r) If necessary for the prevention of waste, as herein defined, to determine, limit, and prorate the production of oil or gas, or both, from any pool or field in the state.

(s) To require, either generally or in or from particular areas, certificates of clearance or tenders in connection with the transportation or delivery of oil or gas, or any product.

(t) To regulate the spacing of wells and to establish drilling units.
(u) To prevent, so far as is practicable, reasonably avoidable drainage from each developed unit which is not equalized by counterdrainage.
(v) To require that geophysical operations requiring a permit be conducted in a manner which will minimize the impact on hydrology and biota of the area, especially environmentally sensitive lands and coastal areas.
(w) To regulate aboveground crude oil storage tanks in a manner which will protect the water resources of the state.
(x) To act in a receivership capacity for fractional mineral interests for which the owners are unknown or unlocated and to administratively designate the operator as the lessee.

(Emphasis added). The conditions imposed by DEP on Coastal's permit are well within the ambit of the agency's authority described above. Those conditions have been satisfied and Coastal's protest is essentially moot; however, because of the several years that the application has been pending, the inventory of oil spill equipment should be updated.

179. Section 377.241, Florida Statutes, provides:

377.241 Criteria for issuance of permits.–
The division, in the exercise of its authority to issue permits as hereinafter provided, shall give consideration to and be guided by the following criteria:
(1) The nature, character and location of the lands involved; whether rural, such as farms, groves, or ranches, or urban property vacant or presently developed for residential or business purposes or are

in such a location or of such a nature as to make such improvements and developments a probability in the near future.

(2) The nature, type and extent of ownership of the applicant, including such matters as the length of time the applicant has owned the rights claimed without having performed any of the exploratory operations so granted or authorized.

(3) The proven or indicated likelihood of the presence of oil, gas or related minerals in such quantities as to warrant the exploration and extraction of such products on a commercially profitable basis.

180. As applicant, Coastal has the burden of establishing by competent substantial evidence its entitlement to the permit it seeks. Florida Dept. of Transportation v. J.W.C., Inc., 396 So. 2d 778 (Fla. 1st DCA 1981). Coastal has met that burden for Permit no. 1281.

181. The first criterion, on its face, has a more limited application than that proposed by the Environmental Petitioners. The legislature's intent to preclude drilling in coastal waters is effectuated not in Section 377.241, Florida Statutes, but in Section 377.242, Florida Statutes, which includes a specific exception for leases entered prior to June 7, 1991. As found above, Coastal's permit meets the first criterion.

182. Coastal's lease 224-A includes requirements for lease payments and for certain minimal drilling or exploration activity. As found above, Coastal has satisfied those requirements and there is no competent evidence that it has abandoned its drilling rights under the lease. Coastal's permit meets the second criterion.

183. The third criterion does not suggest that the prospect for finding oil must be a sure thing. Every expert

testifying on this issue in this proceeding agreed that petroleum exploration is a risky business. Even in a proven productive field, dry holes are drilled. Petroleum geologists rely on data obtained from a variety of sources to select a drilling site, but only the drilling itself can determine with certainty what lies beneath that site. A wealth of credible evidence was presented by the parties on this issue. No evidence could utterly foreclose the possibility that Phillip Ware's prospect is all that he predicts. The greater weight of evidence establishes that it is as least worth a look.

184. Nothing in the text of the three criteria require consideration of the applicant's "motive." If the Environmental Petitioners are correct in their apprehension of "Greenmail" by Coastal to induce the state to buy its lease or to support a claim of inverse condemnation or "taking," the surest way to dissipate those motives is to permit the drilling.

185. The Attorney General and Environmental Petitioners argued at hearing that the unlikelihood of oil was established at the non-jury trial in the Leon County Circuit Court in Coastal's "taking" case related to its retained royalty interests in the nearshore (coast to 4.36 miles offshore) portion of its lease 224-A as modified by settlement in 1976. That "taking" case, Coastal Petroleum Company v. Chiles, was decided first by Circuit Judge Philip J. Padovano on August 5, 1996, and then was affirmed by the First District Court of Appeals on November 5, 1997 (701 So. 2d 619). A footnote in the appellate opinion reiterates the trial court's finding: "We read the trial court's factual determination to indicate that based upon surrounding circumstances, it was purely speculative as to whether any oil existed in this area, a determination which is supported by the evidence contained in the record." [footnote 2, at p. 625]

186. Assuming that the parties, who did not pursue

their res judicata or collateral estoppel theory in their proposed recommended order, have not abandoned their argument, there is no way to construe the court's finding to defeat a drilling permit. Mere speculation that oil exists or does not exist does not offend the third criterion in the grant of a drilling permit. (See also Coastal's discussion of res judicata and collateral estoppel in its proposed recommended order, pp. 60-61.)

187. After the three criteria of Section 377.121 have been satisfied, there remains only the permit condition related to an appropriate surety, the primary source of controversy since the application for permit was first submitted in 1992. Constitutional issues will be resolved in another forum, but factual evidence was thoroughly presented and considered in this proceeding to effectuate the intent of the legislature in Chapter 97-49, Laws of Florida.

188. That recent enactment, codified at Section 377.2425(1)(c), Florida Statutes, provides:

> 377.2425 Manner of providing security for geophysical exploration, drilling, and production.–
> (1) Prior to granting a permit to conduct geophysical operations; drilling of exploratory, injection, or production wells; producing oil and gas from a wellhead; or transporting oil and gas through a field-gathering system, the department shall require the applicant or operator to provide surety that these operations will be conducted in a safe and environmentally compatible manner.
> . . .
> (c) An applicant for a drilling or operating permit for operations planned in coastal waters that by their nature warrant greater surety shall provide surety only in accordance with paragraph (a), or similar proof of financial responsibility other than as

> provided in paragraph (b). For all such applications, including applications pending at the effective date of this act and notwithstanding the provisions of paragraph (b), the Governor and Cabinet in their capacity as the Administration Commission, at the recommendation of the Department of Environmental Protection, shall set a reasonable amount of surety required under this subsection. The surety amount shall be based on the projected cleanup costs and natural resources damages resulting from a maximum oil spill and adverse hydrographic and atmospheric conditions that would tend to transport the oil into environmentally sensitive areas, as determined by the Department of Environmental Protection.

(Emphasis added). Coastal's application was "pending" in 1997 upon the effective date of the act.

189. When there is a change in law in a licensure matter governed under Section 120.60, Florida Statutes, the law at the time of the final decision rather than when the application was filed determines whether the license should be granted. Agency for Health Care Administration v. Mount Sinai Medical Center of Greater Miami, 690 So. 2d 689, 691 (Fla. 1st DCA 1997); Lavernia v. Department of Professional Regulation, 616 So. 2d 53 (Fla. 1st DCA 1993).

190. A Notice of Intent to Issue a permit merely constitutes "proposed agency action" which only becomes "final agency action" if no administrative proceeding is timely initiated pursuant to Sections 120.569 and 120.57, Florida Statutes, or if a hearing is requested, after a Final Order has been entered by the permitting agency either granting or denying the permit. Capeletti Brothers, Inc. v. State Department of Transportation, 362 So. 2d 346, 348-49 (Fla. 1st DCA 1978). The administrative activity leading up to the issuance of a Notice of Intent has been characterized

as "free form" agency action, and as such, the decision produced is merely preliminary. Florida Department of Transportation v. J.W.C. Company, Inc., supra, at 786. Capeletti Brothers, Inc., supra, at 348-49. Where an administrative hearing is requested, a de novo review of the proposed agency decision is conducted by an Administrative Law Judge. Such a hearing is designed to formulate final agency action. McDonald v. Department of Banking and Finance, 346
So. 2d 569, 584 (Fla. 1st DCA 1977).

191. Coastal's permit application in the instant case is no different. Indeed, the above-referenced legal principles are acknowledged in DEP's requirement that the following language to be included when publishing DEP's Notice of Intent

> If a petition is filed, the administrative hearing process is designed to formulate agency action. Accordingly, the Department's final action may be different from the position taken by it in this Notice.

(Rule 62-103.150(2)(d), Florida Administrative Code.)

192. The amount of surety required under Chapter 97-49, Laws of Florida, based upon a recommendation of the DEP, must reflect two separate cost components: projected natural resource damages and projected cleanup costs, both of which result from a maximum oil spill and adverse hydrologic and atmospheric conditions that would tend to transport oil into environmentally sensitive areas.

193. DEP's decision to use the natural resource damage compensation schedule set forth in Section 376.121, Florida Statutes, in computing the projected natural resource damages under Chapter 97-49, Laws of Florida, was reasonable. Section 377.2425, Florida Statutes, does not

contain instructions for determining "natural resource damages." By contrast, Section 376.121, Florida Statutes, sets forth a detailed method by which to calculate damages resulting from the discharge of a pollutant:

> 376.121 Liability for damage to natural resources.–
>
> . . .
>
> To ensure that the public does not bear a substantial loss as a result of the destruction of natural resources, the procedures set out in this section shall be used to assess the cost of damages to such resources. Natural resources shall include coastal waters, wetlands, estuaries, tidal flats, beaches, lands adjoining the seacoasts of the state, and all living things except human beings. The legislature recognizes the difficulty historically encountered in calculating the value of damaged natural resources. The value of certain qualities of
> the state's natural resources is not readily quantifiable, yet the resources and their qualities have an intrinsic value to the residents of the state, and any damages to natural resources and their qualities should not be dismissed merely because of the difficulty in quantifying their value. In order to avoid unnecessary speculation and expenditure of limited resources to determine these values, the Legislature hereby establishes a schedule for compensation for damage to the state's natural resources and the quality of said resources.
>
> (1) The department shall assess and recover from responsible parties the compensation for the injury or destruction of natural resources, including, but not limited to, the death or injury of living things and damage to or destruction of habitat, resulting from pollutant discharges prohibited by s. 376.041. The amount of compensation and any costs of assessing damage and recovering compensation received by the

department shall be deposited into the Florida Coastal Protection Trust Fund pursuant to s. 376.12 and disbursed according to subsection (11). Whoever violates, or causes to be violated, s. 376.041 shall be liable to the state for damage to natural resources.

(2) The compensation schedule for damage to natural resources is based upon the cost of restoration and the loss of ecological, consumptive, intrinsic, recreational, scientific, economic, aesthetic, and educational values of such injured or destroyed resources. The compensation schedule takes into account:

(a) The volume of the discharge.

(b) The characteristics of the pollutant discharged. The toxicity, dispersibility, solubility, and persistence characteristics of a pollutant as affects the severity of the effects on the receiving environment, living things, and recreational and aesthetic resources. Pollutants have varying propensities to injure natural resources based upon their potential exposure and effects. Exposure to natural resources is determined by the dispersibility and degradability of the pollutant. Effects to natural resources result from mechanical injury and toxicity and include physical contamination, smothering, feeding prevention, immobilization, respiratory distress, direct mortality, lost recruitment of larvae and juveniles killed, changes in the food web, and chronic effects of sublethal levels of contaminates in tissues or the environment. For purposes of the compensation schedule, pollutants have been ranked for their propensity to cause injury to natural resources based upon a combination of their acute toxicity, mechanical injury, degradability, and dispersibility characteristics on a 1-to-3 relative scale with Category 1 containing the pollutants with the greatest

propensity to cause injury to natural resources. The following pollutants are categorized:

1. Category 1: bunker and residual fuel.

2. Category 2: waste oils, crude oil, lubricating oil, asphalt, and tars.

3. Category 3: hydraulic fluids, numbers 1 and 2 diesel fuels, heating oil, jet aviation fuels, motor gasoline, including aviation gasoline, kerosene, stationary turbine fuels, ammonia and its derivatives, and chlorine and its derivatives.

The department shall adopt rules establishing the pollutant category of pesticides and other pollutants as defined in s. 376.031 and not listed in this paragraph.

(c) The type and sensitivity of natural resources affected by a discharge, determined by the following factors:

1. The location of a discharge. Inshore discharges are discharges that occur within waters under the jurisdiction of the department and within an area extending seaward from the coastline of the state to a point 1 statute mile seaward of the coastline. Nearshore discharges are discharges that occur more than 1 statute mile, but within 3 statute miles, seaward of the coastline. Offshore discharges are discharges that occur more than 3 statute miles seaward of the coastline.

2. The location of the discharge with respect to special management areas designated because of their unique habitats; living resources; recreational use; aesthetic importance; and other ecological, educational, consumptive, intrinsic, scientific, and economic values of the natural resources located therein. Special management areas are state parks; recreation areas; national parks, seashores, estuarine research reserves, marine sanctuaries, wildlife refuges, and national estuary program water bodies;

state aquatic preserves and reserves; classified shellfish harvesting areas; areas of critical state concern; federally designated critical habitat for endangered or threatened species; and outstanding Florida waters.

3. The areal or linear extent of the natural resources impacted.

(3) Compensation for damage to natural resources for any discharge of less than 25 gallons of gasoline or diesel fuel shall be $50.

(4) Compensation schedule:

(a) The amount of compensation assessed under this schedule is calculated by: multiplying $1 per gallon or its equivalent measurement of pollutant discharged, by the number of gallons or its equivalent measurement, times the location of the discharge factor, times the special management area factor.

(b) Added to the amount obtained in paragraph (a) is the value of the observable natural resources damaged, which is calculated by multiplying the areal or linear coverage of impacted habitat by the corresponding habitat factor, times the special management area factor.

(c) The sum of paragraphs (a) and (b) is then multiplied by the pollutant category factor.

(d) The final damage assessment figure is the sum of the amount calculated in paragraph (c) plus the compensation for death of endangered or threatened species, plus the cost of conducting the damage assessment as determined by the department.

(5)(a) The factors used in calculating the damage assessment are:

1. Location of discharge factor:

a. Discharges that originate inshore have a factor of eight. Discharges that originate nearshore have a factor of five. Discharges that originate offshore have a factor of one.

b. Compensation for damage to natural resources resulting from discharges that originate outside of state waters but that traverse the state's boundaries and therefore have an impact upon the state's natural resources shall be calculated using a location factor of one.

c. Compensation for damage to natural resources resulting from discharges of less than 10,000 gallons of pollutants which originate within 100 yards of an established terminal facility or point of routine pollutant transfer in a designated port authority as defined in s. 315.02 shall be assessed a location factor of one.

2. Special management area factor: Discharges that originate in special management areas described in subparagraph (2)(c)2. have a factor of two. Discharges that originate outside a special management area described in subparagraph (2)(c)2. have a location factor of one. For discharges that originate outside of a special management area but impact the natural resources within a special management area, the value of the natural resources damaged within the area shall be multiplied by the special management area factor of two.

3. Pollutant category factor: Discharges of category 1 pollutants have a factor of eight. Discharges of category 2 pollutants have a factor of four. Discharges of category 3 pollutants have a factor of one.

4. Habitat factor: The amount of compensation for damage to the natural resources of the state is established as follows:

a. $10 per square foot of coral reef impacted.

b. $1 per square foot of mangrove or seagrass impacted.

c. $1 per linear foot of sandy beach impacted.

d. $0.50 per square foot of live bottom, oyster reefs, worm rock, perennial algae, saltmarsh, or freshwater tidal marsh impacted.
e. $0.05 per square foot of sand bottom or mud flats, or combination thereof, impacted.
(b) The areal and linear coverage of habitat impacted shall be determined by the department using a combination of field measurements, aerial photogrammetry, and satellite imagery. An area is impacted when the pollutant comes in contact with the habitat.
(6) It is understood that a pollutant will, by its very nature, result in damage to the flora and fauna of the waters of the state and the adjoining land. Therefore, compensation for such resources, which is difficult to calculate, is included in the compensation schedule. Not included, however, in this base figure is compensation for the death of endangered or threatened species directly attributable to the pollutant discharged. Compensation for the death of any animal designated by rule as endangered by the Florida Game and Fresh Water Fish Commission is $10,000. Compensation for the death of any animal designated by rule as threatened by the Florida Game and Fresh Water Fish Commission is $5,000. These amounts are not intended to reflect the actual value of said endangered or threatened species, but are included for the purposes of this section.

(Emphasis added)

194. Section 376.121, Florida Statutes, represents a comprehensive and definitive statement of the legislature on the value of the state's natural resources and, similarly, on how to compute the values of those resources damaged by a discharge of oil in state waters. It is thus appropriate to utilize this tool to compute potential damages as well as

actual damages. The process, however is difficult and complicated, as described in the findings of fact above.

195. There are no rules to govern DEP's application of the dictates of Chapter 97-49; there are no definitions of the terms "maximum oil spill" and "adverse hydrographic and atmospheric conditions." Those terms are tempered by the overriding requirement that the surety be reasonable.

196. DEP's selection of the Ixtoc I oil spill as a "maximum" volume to apply to the compensation formula was not reasonable. Pressed for time in trying to apply Chapter 97-49 to a pending permit request, DEP selected a "bird in hand," a spill which occurred in foreign waters, under less stringent regulatory restrictions, and under control of the Mexican government. But Ixtoc I happened, and as the largest spill in history, it was plainly The maximum.

197. Had the legislature intended this short-cut process, it well could have dictated its own maximum spill or a flat-rate surety amount. But it is absurd to consider that the "maximum" spill intended is anything but a maximum spill from the site at issue. The greater weight and more competent substantial evidence in this proceeding established that Coastal's "worst case" scenario, rather than DEP's 150 million gallons, is a "reasonable maximum."

198. At the direction of DEP, Coastal developed a careful, well-founded oil-spill trajectory analysis which contributed to proper applications of Chapter 97-49 and the compensation formula of Section 376.121, Florida Statutes. The analysis led to a series of different scenarios, one of which was found above to be best supported by the evidence.

199. In completing the spill trajectory, Coastal's expert calculated a spill boundary that was close to the same boundary derived by DEP from a thumbnail guess. The

difference between the two results was that Coastal appropriately considered the characteristic of the oil to be released and determined that its toxicity would be diffused long before it reached the distant habitat.

200. Cleanup costs projected by Coastal are based on the results of the trajectory analysis and the extensive experience of its expert in working with regulatory agencies on oil spills throughout the world. DEP's short-hand method of extrapolating costs based on another wholly-unrelated event, the Tampa Bay oil spill, was fatally flawed for the reasons described in the findings of fact above.

201. Under certain specified circumstances, Section 376.12, Florida Statutes, provides a $150,000,000 limitation of liability for cleanup costs for a facility responsible for a pollutant discharge. The maximum cleanup cost derived from Dr. Michel's study described above, is below this statutory limit and it is unnecessary to address its relevance.

202. Finally, there are certain considerations urged by Coastal that simply have no basis in the criteria for permit or in the surety calculation. Although a reliable source of petroleum from Florida's coastal waters would have some positive economic impacts, nothing in the relevant statutes permits that as a set-off of the surety amount. Nor do the statutes contemplate consideration of any environmental advantage of avoiding risky and statistically more damaging barge and tanker traffic.

RECOMMENDATION

It is hereby

RECOMMENDED: That a final order be entered by the Department of Environmental Protection granting Permit no. 1281, with the conditions described in paragraphs 74 and

75 and a surety to be established by Final Order of the Administration Commission in the recommended amount of $224,488,571.

DONE AND ENTERED this 8th day of April, 1998, in Tallahassee, Leon County, Florida.

/s/ Mary Clark
MARY CLARK
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
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Filed with the Clerk of the Division of Administrative Hearings this 8th day of April, 1998.

ENDNOTES

[1] During the hearing, certain exhibits were taken under advisement (Coastal's Exhibits no. 248, 335, and 355-358) and, they are now received in evidence. These are oil spill statistical reports maintained by the U.S. Department of Interior, Mineral Management Service (MMS) and by Cutter Information Corporation. Dr. Dagmar Etkin testified at length on the methodology her company (Cutter) uses to obtain and maintain the data. Experts, including those who participated in this hearing, rely on the governmental agency's publications and on Cutters's. The documents are admissible as hearsay exceptions, as provided in Section 90.803(17), Florida Statutes. In this case, the publications were helpful in comparing types, rough approximate amounts, and locations of oil spills.

[2] At least 2 wells in the Jay field achieved a flow rate of approximately 7000 barrels per day during the production stage and after multiple applications of hydrochloric acid to stimulate the flow. This flow rate does not approximate a reasonable natural flow during a blowout.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order must be filed with the agency that will issue the Final Order in this case.

COASTAL PETROLEUM COMPANY AND ALMERIA T. COTTINGHAM, ANNE M. CLARK, HELEN T. KERR, HUGH C. MacFARLANE, WILLIAM W. ARNOLD AND CHARLES E. ARNOLD, APPELLANTS,

v.

LAWTON CHILES, GOVERNOR, ET AL., AS AND CONSTITUTING THE BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT TRUST FUND OF FLORIDA; AND THE DEPARTMENT OF ENVIRONMENTAL PROTECTION, APPELLEES.

Nos. 95-2225, 95-2628.

District Court of Appeal of Florida, First District.

April 4, 1996.

An appeal from Final Orders of the Board of Trustees of the Internal Improvement Trust Fund.

Robert J. Angerer and Robert J. Angerer, Jr. of Angerer and Angerer, Tallahassee, for Appellant Coastal Petroleu Company; John K. Aurell of MacFarlane, Ausley, Ferguson & McMullen, Tallahassee, and Charles W. Pittman and Susan W. Fox of MacFarlane, Ausley, Ferguson & McMullen, Tampa, for Appellants Almeria T. Cottingham, Anne M. Clark, Helen T. Kerr, Hugh C. MacFarlane, William W. Arnold, and Charles E. Arnold.

Robert A. Butterworth, Attorney General, and Denis Dean, Assistant Attorney General, Tallahassee, for Appellees.

ALLEN, Judge.

Coastal Petroleum Company (Coastal) and other interested persons appeal from final orders of the appellee Board of Trustees of the Internal Improvement Trust Fund (the trustees) whereby the trustees relied upon section 253.571, Florida Statutes, in requiring a surety bond as a condition precedent to Coastal's drilling for oil and gas. Because the trustees' retroactive application of the statute to a preexisting oil and gas lease impairs obligations under the preexisting lease contract, we conclude that it contravenes article I, section 10 of the state constitution. Accordingly, we set aside the final orders.

Pursuant to an oil and gas lease executed in the 1940's and a settlement agreement executed in 1976 between Coastal and the State of Florida, Coastal has the exclusive right to explore for and produce oil and gas from certain submerged sovereignty lands in the Gulf of Mexico. *In Coastal Petroleum Co. v. State Department of Environmental Protection,* 649 So.2d 930 (Fla. 1st DCA 1995), we held that the Department of Environmental Protection lacked authority to require security in addition to Coastal's payment of an annual fee pursuant to section 377.2425, Florida Statutes, as a condition precedent to granting Coastal's application for a permit to drill an oil and gas exploration well upon the leased lands. Subsequent to that decision, the trustees relied upon section 253.571 in ordering that Coastal would be required to post a $500 million bond as a further condition precedent to any drilling upon the leased lands. The trustees then reconsidered the issue and voted to raise the bond requirement to $1.9 billion. The two orders have been consolidated for this appeal.

Section 253.571 authorizes the trustees to require a bond from each lessee of public land prior to the lessee's

drilling for oil or gas upon leased lands. But Coastal contends that application of the statute to its lease constitutes an impairment of the obligation of contract, contrary to article I, section 10 of the state constitution, because its lease was executed in the 1940's and section 253.571 was not enacted until 1969. Relying upon cases such as *State v. Leavins*, 599 So.2d 1326, 1331-32 (Fla. 1st DCA 1992), Coastal argues that the statute cannot apply retroactively to impose a substantial condition not contained in the preexisting lease contract. The trustees offer several arguments for their contention that the lease is subject to the bond requirement of the statute.

The trustees first rely upon the following language in the 1976 settlement agreement to argue that Coastal subjected itself to section 253.571:

> Coastal shall secure permits from all appropriate State environmental protection agencies in compliance with the then existing laws and regulations, prior to any drilling or mining.

This provision, which by its unambiguous language applies to the laws and regulations pertaining to the permitting process, does not aid the trustees in this case because the trustees, by their own concession, are not a permitting agency. Furthermore, another part of the settlement agreement states:

> The Trustees agree that drilling obligations shall be governed by Chapter 680, Laws of Florida, Acts of 1941, and that all further drilling requirements are hereby waived.

This language expressly waived any right of the trustees to assert drilling requirements not specified in the referenced statutes.

Alternatively, the trustees suggested for the first time at oral argument that they had the authority to impose the bond requirement because section 253.571 is merely a continuation of the trustees' broad authority pursuant to section 253.04, Florida Statutes (1941), which provides that the trustees may "take such other action or do such other things as may in the judgment of the said trustees be necessary for the full protection and conservation of the said lands." We do not read section 253.04, which recites the general duty of the trustees to protect state lands, as providing the trustees with broad discretion to rewrite legally binding state contracts. We therefore cannot agree that section 253.04 provides a valid basis for the trustees' actions in this case.

Finally, the trustees argue that even if they were without authority to impose the bond under the terms of the lease, section 253.571 does not unconstitutionally impair the obligation of contract under the federal constitutional analysis set forth by the United States Supreme Court in *Energy Reserves Group, Inc. v. The Kansas Power & Light Co.*, 459 U.S. 400, 103 S.Ct. 697, 74 L.Ed.2d 569 (1983). However, *Energy Reserves Group* is unavailing to the trustees because there the state was not one of the contracting parties. As the Supreme Court in that case recognized:

> When a State itself enters into a contract, it cannot simply walk away from its financial obligations. In almost every case, the Court has held a governmental unit to its contractual obligations when it enters financial or other markets.

459 U.S. at 413 n. 14, 103 S.Ct. at 705 n. 14. (citations omitted); *see United States Trust Co. v. New Jersey*, 431 U.S. 1, 97 S.Ct. 1505, 52 L.Ed.2d 92 (1977).

Likewise, under the contracts clause of our state constitution, little tolerance has been shown for the state's attempts to alter its own contracts. For example, in *Chiles v. United Faculty of Florida*, 615 So.2d 671 (Fla. 1993), an agreement for pay raises for state workers was reached and initially funded by the legislature. When a shortfall in projected revenue required legislative action to balance the budget, the legislature attempted to postpone the raise. The supreme court held this action violated article 1, section 10, explaining:

> The right to contract is one of the most sacrosanct rights guaranteed by our fundamental law. It is expressly guaranteed by article 1, section 10 of the Florida Constitution. . .. The legislature has only a very severely limited authority to change the law to eliminate a contractual obligation it has itself created.

Id. at 673. While recognizing that the legislature has authority to reduce previously approved appropriations where it can demonstrate a compelling state interest, the court emphasized:

> Before that authority can be exercised, however, the legislature must demonstrate no other reasonable alternative means of preserving its contract with public workers, either in whole or in part.

Id. The court concluded that the state had not met that burden where it had not demonstrated that the funds were unavailable from other possible reasonable sources.

Similarly, the trustees here have failed to demonstrate that imposing the bond at issue is the only means available to protect the state lands, particularly in light of the existing surety requirements of section 377.2425, Florida Statutes, and Coastal's agreement in the lease contract to assume "responsibility for all damages caused by [its] operations." Accordingly, we must conclude that the $1.9 billion bond requirement would substantially impair the obligation of the lease contract in violation of article I, section 10.

The final orders are set aside.

BARFIELD and KAHN, JJ., concur.

COASTAL PETROLEUM COMPANY AND ALMERIA T. COTTINGHAM, ANNE M. CLARK, HELEN T. KERR, HUGH C. MacFARLANE, WILLIAM W. ARNOLD, AND CHARLES E. ARNOLD, APPELLANTS,

v.

DEPARTMENT OF ENVIRONMENTAL PROTECTION, APPELLEE.

No. 95-3833.

District Court of Appeal of Florida, First District.

April 26, 1996.

An appeal from an order of the Department of Environmental Protection.

Robert J. Angerer and Robert J. Angerer, Jr. of Angerer & Angerer, Tallahassee; and John K. Aurell and Charles W. Pittman of MacFarlane, Ausley, Ferguson & McMullen Tampa, for Appellants.

Robert A. Butterworth, Attorney General; Denis Dean and Jonathan A. Glogau, Assistant Attorneys General, Tallahassee, for Appellee.

PER CURIAM.

Coastal Petroleum Company (Coastal) and other interested persons appeal a final order of the Department of Environmental Protection (department) denying Coastal's application for a permit to drill for oil and gas. The department denied the permit on the ground that it had not

been notified by the Board of Trustees of the Internal Improvement Trust Fund (the trustees) that it had received financial security in the amount of $1.9 billion being required by the trustees. Coastal argues on appeal that the department had no legal basis to deny its application for a drilling permit because the trustees lacked the authority to impose the $1.9 billion bond requirement. We agree and reverse on the authority of *Coastal Petroleum Co. v. Chiles*, 672 So.2d 571 (Fla. 1st DCA 1996), in which this court held that the trustees' retroactive application of section 253.571, Florida Statutes, to a preexisting oil and gas lease to impose a $1.9 billion bond requirement impaired obligations under Coastal's lease contract and thereby contravened Article I, section 10 of the state constitution.

REVERSED and REMANDED.

BARFIELD, KAHN and DAVIS, JJ., concur.

COASTAL PETROLEUM COMPANY AND ALMERIA T. COTTINGHAM, ANNE M. CLARK, HELEN T. KERR, HUGH C. MacFARLANE, WILLIAM W. ARNOLD AND CHARLES E. ARNOLD,

APPELLANTS,

v.

STATE OF FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION,

APPELLEE.

No. 94-219.

District Court of Appeal of Florida, First District.

February 9, 1995.

Appeal from the Department of Environmental Protection.

Robert J. Angerer, Tallahassee, for Coastal Petroleum Co.

Susan W. Fox and Charles W. Pittman of MacFarlane, Ausley, Ferguson & McMullen, Tampa, for intervenors.

Robert A. Butterworth, Atty. Gen., Denis Dean and Jonathan A. Glogau, Asst. Attys. Gen., Tallahassee, for appellee.

ALLEN, Judge.

Coastal Petroleum Company (Coastal) and other interested persons appeal from a final order denying Coastal's application for a permit to drill a gas and oil exploration well. Because the appellee Department of

Environmental Protection (the department)* was without authority to require security from Coastal in addition to its payment into the Petroleum Exploration and Production Bond Trust Fund (the fund), we reverse.

Pursuant to an oil and gas lease executed in 1947 and a settlement agreement executed in 1976 between Coastal and the State of Florida, Coastal has the exclusive right to explore for and produce oil and gas from certain submerged sovereignty lands of the state located in the Gulf of Mexico. In the original drilling lease, Coastal agreed to assume "responsibility for all damages caused by [its] operations," and in the 1976 settlement agreement Coastal further agreed to "secure permits from all state environmental protection agencies in compliance with the then existing laws and regulations."

Coastal submitted an application for a permit to drill an oil and gas exploration well upon leased lands. The department advised Coastal that it would be required to provide acceptable security of a value of $515,000,000 as a condition precedent to issuance of the permit. This amount was based upon the estimated cleanup costs and damages to the state's natural resources that would result from a spill. Coastal elected to join the fund as a means of providing security and paid the $4000 annual fee specified by section 377.2425(1)(b), Florida Statutes. Under protest, Coastal unsuccessfully endeavored to satisfy the department's additional security requirements. The department issued a final order denying Coastal's permit, stating that the

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* Pursuant to Chapter 93-213, Laws of Florida, the Department of Environmental Protection is the successor agency to the Department of Natural Resources. Some of the actions attributed herein to the Department of Environmental Protection were actually performed by the Department of Natural Resources.

application did not adequately ensure the protection of the state's coastal and marine resources. Proceedings under section 120.57(2), Florida Statutes, resulted in a final order affirming the permit denial.

Relying upon the well established principle that the powers of administrative agencies are measured and limited by the statutes or acts in which such powers are expressly granted or implicitly conferred, *e.g., State Dept. of Envtl. Regulation v. Puckett Oil,* 577 So.2d 988, 991 (Fla. 1st DCA 1991), the appellants correctly argue that the final order must be reversed because the department acted without authority and contrary to legislative intent when it required security in excess of the annual fund fee. Section 377.2425, entitled "Manner of providing security for geophysical exploration, drilling and production," requires an applicant seeking a permit for geophysical operations "to provide surety that these operations will be conducted in a safe and environmentally compatible manner." The statute then provides two methods to comply with this requirement. Under 377.2425(1)(a) an applicant may provide a deposit of cash or other securities, a surety bond, or an irrevocable letter of credit. *Alternatively,* under 377.2425(1)(b):

> An applicant for a drilling, production, or injection well permit, or a permittee who intends to continue participating in longterm production activities of such wells, *has the option* to provide surety to the department by paying an annual fee to the Petroleum Exploration and Production Bond Trust Fund. For an applicant or permittee choosing this option the following shall apply:
>
> 1. For the first year, or part of a year, of drilling production, or injection well permit, or change of operator, the fee is $4000 per permitted well.

(Emphasis added.) Nothing in section 377.2425 suggests that the department can require additional security when an applicant has paid into the fund. Indeed, the clear and unambiguous language of the statute reveals a legislative intent that payment of the annual fund fee should be accepted as fully satisfying the security requirements for a drilling permit. When the language of a statute is clear and unambiguous, the statute must be given its plain and ordinary meaning. *See Savona v. Prudential Ins. Co. of America,* 648 So.2d 705 (Fla. 1995).

Nevertheless, the department points to sections 376.121 and 376.40(6), Florida Statutes, and to the language in the original drilling lease as authority for requiring additional security. But these statutory and contractual provisions, which indicate that Coastal will be responsible for damages caused by its drilling operations, do not suggest that the department has authority to require security greater than that specified in section 377.2425(1)(b).

Accordingly, the final order is reversed and the case is remanded.

BARFIELD and KAHN, JJ., concur.

DRILLING LEASE NO. 224-A AS MODIFIED

BETWEEN

TRUSTEES OF THE INTERNAL IMPROVEMENT FUND

OF THE STATE OF FLORIDA

AND

COASTAL PETROLEUM COMPANY

February 27, 1947

DRILLING LEASE NO. 224-A AS MODIFIED

WHEREAS, pursuant to the provisions of Chapter 20680, Laws of Florida, Acts of 1941, for a valuable consideration therein stated, the Trustees of the Internal Improvement Fund of the State of Florida, as Lessor, and Arnold Oil Explorations, Inc., a Florida corporation having its principal place of business in Groveland, Florida, now Coastal Petroleum Company, with its principal place of business in St. Petersburg, Florida, as Lessee, duly executed Drilling Lease No. 224-A, dated the 27th day of December, 1944, which said lease is now in full force and effect, and all rentals due thereon have been duly paid, and

WHEREAS, the United States of America has made claim to the title to a large part of the areas included within said lease, and WHEREAS, the United States of America has filed suit against the State of California, being No. 12 Original, 1945 Term, which suit involves the title to and oil rights of Tidewater Lands of the State of California,

(but may affect the title to a large part of the areas included within the said lease) and

WHEREAS, such litigation renders the reformation of the Drilling Blocks as described in Lease No. 224-A expedient and desirable for the purpose of permitting immediate drilling thereunder while maintaining within such lease provisions the areas included in such Drilling Blocks pending the outcome of such litigation and assures to the said parties a reasonable area around each well drilled the title to which is not question in such suit, and

WHEREAS, certain other provisions of said lease appear difficult of construction, and require clarification as between the said parties, and

WHEREAS, it is the purpose and intent of the said parties to modify said lease in certain particulars only to permit a practical performance thereof, but not to extinguish said lease, nor to relieve the parties thereto of their obligations thereunder, but to render the same more certain and explicit, and

WHEREAS, it is the purpose and intent of the said parties to ratify and confirm, with the modifications hereinafter shown, the said Drilling Lease No. 224-A.

Now, THEREFORE, said lease is hereby modified in certain particulars only so that the same shall now read as follows:

"THIS AGREEMENT, Made and entered into in duplicate this 27th day of December, A. D. 1944, by and between the Trustees of the Internal Improvement Fund of the State of Florida, hereinafter called 'TRUSTEES' or 'LESSORS', and ARNOLD OIL EXPLORATIONS, INC.,

a Florida corporation having its principal place of business in Groveland, Florida, hereinafter called 'LESSEE'.

WITNESSETH

For and in consideration of the sum of Five Hundred ($500.00) Dollars per drilling block as hereinafter described, to them in hand paid, receipt whereof is hereby acknowledged, together with the covenants, agreements and stipulations hereinafter contained, as well as in further reference to and in pursuance of a certain EXPLORATION CONTRACT FOR OIL, GAS AND MINERALS AND OPTION TO LEASE, heretofore executed between Trustees and Lessee, the same being dated the 4th day of October, 1941, said Trustees, under authority of Chapter 20680, Laws of Florida, Acts of 1941, have leased, and by these presents do hereby lease, unto said Lessee for the sole and only purpose of prospecting, drilling, mining and operating for the production of oil, gas and sulphur, laying pipe lines, building tanks, roads, power stations and structures thereon, but not including bulkheading and filling water bottoms except when express permission therefore has been obtained from Trustees, as may be necessary to produce, save and take care of said products and taking the production thereof, those certain areas referred to in said Exploration Contract as DRILLING BLOCKS and more particularly described as follows, to wit:

All water bottoms of the Gulf of Mexico within three leagues (10.36 statute miles) of the ordinary high water mark of the outermost shore included within Drilling Blocks 1, 2, 3 and 4 inclusive as said drilling blocks appear upon a map which is attached hereto and made a part of this lease.

Also all submerged lands and water bottoms of all bays, sounds and bayous of the Gulf, and adjacent Government waterfront lots contiguous to the water

bottoms of the Gulf of Mexico herein first described in Drilling Blocks 1, 2, 3 and 4 as said drilling blocks appear upon a map which is attached hereto and made a part of this lease.

Also the bottoms of and water bottoms adjacent to the rivers which flow through natural channels into the Gulf of Mexico and where included in the description of Lease 224-A prior to modification thereof.

The Lessor finds and it is agreed that Lease 224-A prior to modification was intended to include all lands submerged and unsubmerged which are described herein and that all lands submerged and unsubmerged which were included in Lease 224-A prior to modification including but not by way of limitation all areas described therein, as Drilling Blocks 1-A to 13-A inclusive, the north portion of Drilling Block 8-B and all of Drilling Blocks 9-B to 14-B inclusive are included herein.

This lease covers the area included between the northwest boundary of Lease 224-A prior to modification; the southern boundary of said lease prior to modification, which is the projection westward from the shore of the township line between Townships 25 and 26 South; the western, or off-shore boundary, shall be a line 10.36 statute miles seaward from the outermost land; the eastern boundary shall include the areas as described in Exploration Contract No. 224, dated October 4, 1941.

DRILLING BLOCK NO. 1 of said lease shall include the area as follows:

> Bounded on the west by the northwest boundary of Lease No. 224-A prior to modification; on the east by the projection southward from the shore of the range line between Ranges 2 and 3 West; the south, or off-shore boundary, shall be a line 10.36 statute miles seaward from the outermost land; the north boundary shall include the area as

described in Exploration Contract No. 224, dated October 4, 1941.

DRILLING BLOCK NO. 2 of said lease shall include the area as follows:

Bounded on the west by the eastern boundary of Drilling Block No. 1 as herein defined; on the southeast by the projection westward from the shore of the township line between Townships 10 and 11 South; the southern, or off-shore boundary, shall be a line 10.36 statute miles seaward from the outermost land; the north boundary shall include the area as described in Exploration Contract No. 224, dated October 4, 1941.

DRILLING BLOCK NO. 3 of said lease shall include the area as follows:

Bounded on the north by the southeast boundary Drilling Block No. 2 as herein defined; on the south by the projection westward from the shore of the township line between Townships 16 and 17 South; the western, or off-shore boundary, shall be a line 10.36 statute miles seaward from the outermost land; the eastern boundary shall include the area as described in Exploration Contract No. 224, dated October 4, 1941.

DRILLING BLOCK NO. 4 of said lease shall include the area as follows:

Bounded on the north by the southern boundary of Drilling Block No. 3 as herein defined; on the south by the southern boundary of Lease No. 224-A prior to modification, which is the projection westward from the shore of the township line

between Townships 25 and 26 South; the western, or off-shore boundary, shall be a line 10.36 statute miles seaward from the outermost land; the eastern boundary shall include the area as described in Exploration Contract No. 224, dated October 4, 1941.

All rivers, sloughs, arms and overflow lands included in the above blocks are to be considered a part of that particular drilling block into which the respective river, slough, arm or overflow land drains or empties.

The lease and its subdivision into drilling blocks are shown upon a map which is attached hereto and made a part hereof.

Each drilling block shall comprise all coastal off-shore areas of the Gulf of Mexico, together with all bars, islands and adjacent Government waterfront lots contiguous thereto; all bays, bayous, sounds and inlets of the Gulf, together with all connecting sloughs, flats and/or the overflow and/or submerged lands, all bars and islands and all adjacent Government waterfront lots contiguous to such areas; all rivers and lakes named or described herein, together with all connecting sloughs, arms and overflow lands located in such waters.

It is mutually covenanted, understood and agreed by and between the respective parties hereto that the terms of this lease be and they are as follows:

-1-

In consideration of the sum hereinbefore stated, the work herein agreed to be performed, the royalties herein provided for, and all other agreements of Lessee herein contained, said Trustees do hereby grant, lease and let exclusively unto Lessee and Lessee's successors and assigns, subject to the express permission requirements herein contained, those certain areas hereinbefore

described, for the purpose of drilling for and producing therefrom oil, gas, sulphur, casinghead gas and casinghead gasoline, together with rights of way and easements for roads, pipe lines, telephone and telegraph lines, tanks, power houses, stations, gasoline plants and fixtures for producing, treating and caring for such products, as well as any and all other rights and privileges necessary and incident to or convenient for the economical operation of such areas, alone or conjointly with neighboring areas, for oil, gas, sulphur, casinghead gas and casinghead gasoline; and with the further right to inject water, gas or oil into sub-surface strata, provided such injections in no way damage any water or intrude any structure containing water suitable and necessary for either present or future domestic requirements.

-2-

Subject to the other provisions herein contained, this lease shall be for a term of five (5) years, computed from December 27, 1944, hereinafter sometimes referred to as the primary term, and as to each DRILLING BLOCK as long thereafter as oil, gas or other minerals are produced from such Drilling Block, subject to renewal thereof for periods of five years each, as hereinafter provided.

-3-

Lessee agrees to drill at least one (1) test well on each Drilling Block within the first five year period of this lease, and to drill at least one (1) additional well in each succeeding five (5) year renewal period hereof upon each separate Drilling Block until the total number of wells drilled upon each Drilling Block shall equal one-half (1/2) the number of sections of land, or equivalent, embraced in such Drilling Block.

Lessee at the time of the drilling of each well on a Drilling Block is commenced shall file with Trustees a written declaration describing the Drilling Block and the sections of land thereof to which such well shall apply. If no well shall be commenced within the first five (5) year period of this lease, all rights to renew this lease shall become unenforceable and the entire lease shall be void, and if during each subsequent five (5) year renewal period hereof no well or wells be commenced as required herein, such renewal lease contract in its entirety shall become terminated as to any area in such Drilling Block not in a status conformable in this particular with the requirements of this lease.

The location of well or wells in each Drilling Block is at the option of Lessee. Said well or wells shall be drilled to a depth not less than six thousand (6,000) feet, when drilling is specified unless oil, gas or sulphur has been found in paying quantities or igneous rock, or Paleozoic formation, or formations not susceptible of being drilled with first-class drilling equipment is encountered at a lesser depth.

If drilling operations on the said test well are not commenced within five years from December 27, 1944, and continued thereafter to completion with reasonable diligence and in a workmanlike manner to discover and develop said premises for the production of oil, gas or sulphur until such wells are completed or abandoned, the entire lease shall be void, provided, however, that if the Lessee shall have commenced drilling operations during the primary term, which after completion shall comprise in the aggregate 24,000 feet of hole, all drilling obligations herein required during the primary term shall have been met and said lease shall be renewed for the ensuing five year period as to all of the Drilling Blocks described herein. Thereafter, if drilling operations on a well or wells are not commenced within each five year period, and continued thereafter to

completion with reasonable diligence and in a workmanlike manner to discover and develop such premises for the production of oil, gas or sulphur until such wells are completed or abandoned, the entire lease shall be void, provided, however, that if the Lessee shall have commenced drilling operations during the said term of five years, or any subsequent term, which after completion shall comprise in the aggregate 24,000 feet of hole all drilling obligations herein required during the said term shall have been met and said lease shall be automatically renewed for the ensuing five year period as to all of the Drilling Blocks described herein.

Notwithstanding all provisions to the contrary, it is understood that drilling of a total of 24,000 feet in wells begun during the primary term and drilling of a total of 24,000 feet in drilling operations begun in each five year term thereafter shall operate to extend this lease as to all of the Drilling Blocks described herein, for an additional term of five years. Drilling operations commenced on any block or blocks that result in meeting the depth requirement herein contained, shall operate to hold that block, and any excess over 6,000 feet drilled on any block shall constitute a credit and be applied against the footage Lessee is obligated to drill on any other drilling block in said lease.

What is termed a core hole, or hole for formation determination, shall not be considered a well under the terms of this lease.

The Lessor does hereby find that the plan of drilling on said Drilling Blocks as herein set out is of advantage to the Lessor for the accomplishment of the purpose of discovering and producing oil on the premises herein leased and carries out the real intent and purpose of Drilling Lease 224-A prior to modification.

-4-

The royalties to be paid Trustees are:

(a) On Oil, if paid in kind, one-eighth (1/8) of that produced and saved from said land, the same to be delivered at the wells, or to the credit of Trustees into the pipe line to which the lines may be connected; Lessee shall have the right from time to time to purchase any royalty oil in Lessee's possession, paying the market price therefor prevailing for the field where produced, on the date of purchase.

(b) On Gas, including casinghead gas or other gaseous substances, produced from said land and sold or used off the premises, or in the manufacture of gasoline or other products therefrom, the market value at the mouth of the well of one-eighth (1/8) of the gas, in its natural state, so sold or used, provided that on gas sold at the wells the royalty shall be one-eighth (1/8) of the amount of such sale; where gas, from a well producing gas only, is not sold or used, Lessee must pay as royalty One Hundred ($100.00) Dollars on such well per year, and upon such payment it will be considered that gas is being produced within the meaning of Paragraph 2 hereof for one five (5) year lease period if Lessee desires the renewing privilege of said paragraph with respect thereto.

(c) On Sulphur, the royalty shall be fifty cents ($.50) per long ton, payable when mined.

(d) Any and all cash payments hereunder by Lessee to Trustees shall be made by said Lessee to Trustees at Tallahassee, Florida.

(e) Lessee shall have the free use of oil, gas and water from said lands, when used in the

operation of this lease, which shall not be subject to royalty requirements hereof.

-5-

For the purpose of examining the production therefrom, Trustees or their authorized representatives or agents at all reasonable times shall have access to the wells, gauge books, oil and/or gas meters, tanks, reservoirs, sump holes, buildings, and other structures and appliances placed upon the lands by Lessee.

-6-

Lessee agrees to keep logs of any and all wells drilled upon the leased premises, which said logs shall at all times be subject to inspection of Trustees, their representatives or agents, and within such time as required by law Lessee shall furnish the Trustees with a copy of said log. Lessee also agrees to take regular samples of material encountered, at intervals not greater than thirty (30) feet, and, as each sample is taken, to forward to the said Trustees a portion thereof, not less than three (3) ounces in weight, within such time as required by law, marked to indicate the Drilling Block from which it is taken and the depth and the day the same is taken. Lessee further agrees to keep true and correct accounts of petroleum and/or gas, or other valuable substances from each and every well drilled on the leased premises where any production is found and saved, which said accounts shall be open at all times to the inspection of Trustees or their authorized representatives or agents.

-7-

The total area in said Drilling Blocks 1, 2, 3 and 4 is agreed to be 1,936,100 acres, whether the same is

actually later determined to be more or less, and the total annual rental thereon shall be $22,566.40, and which sum the Lessor does hereby find is equal to the amount provided to be paid as rental by the Lessee under this lease before modification. No rentals shall be paid on any area, or the portion of any area, which Lessee has surrendered to Trustees as herein provided, nor shall Lessee be required to pay rentals on any drilling block wherein oil in commercial quantities is being produced.

For rental purposes, each drilling block shall be deemed to be one-fourth (1/4) of the total acreage and for any part of a drilling block at the rate which that part bears to the whole.

The drilling of each well shall be prosecuted with due diligence as hereinbefore required. If the first and all subsequent wells drilled on any drilling block commenced within the terms of this lease and before the expiration of five (5) years from this date, shall result as dry holes, then the lease shall be extended as to such Drilling Block for an additional period of five (5) years under the terms and conditions as herein set out for such renewal period. The payment or tender of rental may be made by the valid check or draft of Lessee mailed or delivered to Lessor on or before such date of payment. The down cash payment at the time of executing this lease is consideration for this lease according to its terms and shall not be allocated as mere rental for a period.

This lease contemplates the reasonable development of the oil and gas underlying the land described in this lease including the drilling of as many wells as a reasonably prudent operator would drill under the same or similar circumstances. In the event a well or wells producing oil or gas in paying quantities should be brought in on adjacent land and within three hundred thirty (330) feet of and draining the leased premises, or acreage pooled therewith, Lessee agrees to drill such offset wells as

a reasonably prudent operator would drill under the same or similar circumstances.

-8-

On what are commonly termed coastal and tide water areas, no well shall be begun nearer than two hundred (200) feet from the ordinary high water mark of the shore, nor for lake and river areas, nearer than fifty (50) feet from the ordinary high water mark, without the written consent of the owner of adjoining upland; nor shall any well be begun within one-eighth (1/8) of a mile of the shore line in front of any village of five (5) or more families; and where the majority of the dwelling houses occupied by said families are each less than three hundred (300) feet from another of such dwelling houses, without the written consent of the owners of the water front upland situated one-fourth (1/4) of a mile each way from a line drawn from the well to the shore line at the nearest point; nor shall any well be begun within the corporate limits of any municipality without the written consent of the governing authorities thereof. No well shall be begun nearer than two hundred fifty (250) feet from the right of way of any State Highway without the consent of Lessors. The inhibitions of this paragraph shall not apply where producing wells shall have been drilled on lands, not included in this lease, within two hundred fifty (250) feet of the inhibited area.

-9-

Except as may otherwise be provided herein, Lessee shall procure all necessary permits from the Federal Government and assume all responsibilities to the Federal Government incident to the operations of this lease, but the Lessor shall cooperate in securing such permits.

-10-

Lessee shall have the right at any time to remove all machinery and fixtures placed by Lessee on said leased premises, including the right to withdraw and remove casing.

-11-

Any well, or hole, after being drilled, unless in operation, shall be securely capped, or if casing is removed, shall be permanently and tightly sealed to the satisfaction of Trustees in such manner and so placed as to prevent escape of salt water or undesirable material to the surface, or its intrusion into any sub-surface structure bearing water in sufficient quantity and of quality suitable for domestic purposes.

-12-

Lessee shall bury his pipe line not less than fifteen (15) inches below ground surface, or if water areas are traversed, said pipe line shall be so laid that no obstruction to navigation or use of waterway will result therefrom.

-13-

The rights of either party hereunder may be assigned in whole or in part only after written consent thereto from the Trustees is first obtained; and the provisions hereof shall extend to the successors and assigns of the parties hereto, but no change or division in ownership of land rentals or royalties, however accomplished, shall operate to enlarge or diminish the obligations or the rights of either party. Neither this lease nor the work to be performed hereunder shall in any way limit the right of said Trustees to sell or dispose of, or to lease for other purposes than those herein, any area or areas

herein described or any part thereof covered by this lease, but in case of sale, conveyance or lease by the said Trustees, such sale, conveyance or lease shall be subject to this lease.

In the event of any legal assignment of this lease as to a segregated portion of the area covered thereby, the rentals payable hereunder shall be apportionable as between the several leasehold owners ratably according to the area of each, and deferment of rental payments by one shall not affect the rights of other leasehold owners hereunder.

-14-

The breach by Lessee of any obligations arising hereunder shall not work as a forfeiture or termination of this lease, nor cause a termination or reversion of the estate created hereby, nor be grounds for cancellation hereof in whole or in part, except as otherwise provided herein and except as forfeitures may be imposed by laws of this State.

In the event the Trustees consider that operations hereunder are not at any time being conducted in compliance with this lease, said Trustees shall notify Lessee in writing of the facts relied upon as constituting a breach hereof and Lessee, if in default, shall have thirty (30) days after the mailing or sending of such notice in which to commence compliance with the obligations imposed by virtue of this instrument. If Lessee is in fact not complying with the terms of the lease and if commencement of compliance shall not have been undertaken by Lessee within said thirty (30) days, and pursued to the satisfaction of Trustees, said Trustees shall have the right without further notice to declare this lease in default as to any part so affected, and thereupon all rights of Lessee hereunder as to such part shall terminate and cease.

-15-

When drilling or other operations are delayed or interrupted by lack of water, labor or material, or by fire, storm, flood, war, rebellion, insurrection, riot, strike, differences with workmen, or failure of carriers to transport or furnish facilities for transportation, or as a result of some order, requisition or necessity of the Government, or as the result of any cause whatsoever beyond the control of the Lessee, when notice thereof and claim therefor shall have been given to the Trustees within twenty (20) days of the occurrence of the excusing cause, the time of such delay or interruption shall not be counted against Lessee, anything in this lease to the contrary notwithstanding; EXCEPT, HOWEVER, as to requirements with respect to drilling as provided in Chapter 20680, Laws of Florida, Acts of 1941.

-16-

Lessee shall have the right to surrender any portion of any area described herein without in any way impairing its rights under this lease in remaining parts or portions. In the event of surrender of any portion, Lessee shall execute to Trustees a release of the part or parts Lessee desires to surrender.

-17-

Lessee shall not issue any stock or other securities to finance its obligations hereunder prior to the production of gas, oil or other minerals in paying quantities without the approval of the Trustees unless such issue meets the requirements of the Federal Securities and Exchange Commission or the requirements of the "BLUE SKY LAWS" of any State where such stock may be sold.

-18-

Lessee assumes responsibility for all damages caused by Lessee's operations and will in all respects save the Trustees harmless on account of anything growing out of this lease, the source of which is the operations of said Lessee.

19-

No well drilled under the terms of this lease, and capable of producing oil, gas or sulphur in commercial quantities, may be closed and production of oil, gas or sulphur therefrom curtailed, without the written consent of the Trustees.

-20-

Lessee agrees that it will on or before September 1, 1947, start drilling operations on a location to be selected by it in this lease or in Lease No. 224-B, dated March 27, 1946, or in Lease No.248, dated December 19, 1944, and that it will prosecute the drilling of such well with due diligence. The agreements to drill this well appear in Paragraphs Twenty (20) of this lease, Lease 224-B and Lease 248 and refer to the same well and are not to be construed as cumulative. Lessee further agrees that it will commence drilling operations within the primary term of this lease that will with due diligence thereafter and upon completion accomplish the drilling of at least 24,000 feet of hole on this lease. Lessee also agrees that thereafter at least one set of tools will be employed continuously during the remainder of the primary term of Leases 224-B, 248 and this lease until at least 24,000 feet of hole has been drilled on this lease, and that there will not be an interruption of over 120 days, except for force majeure, between the completion

of one well and the beginning of drilling operations on another well on one of the said leases.

-21-

It is understood that in any of the drilling obligations with respect to the areas covered by this lease, Lessee may acquire the right to drill and may drill on areas contiguous thereto, in which case the said drilling operations will be accepted as compliance with the Lessee's drilling obligations on the areas covered by this lease as to any one Drilling Block contiguous thereto, provided that a 1/8 royalty in the well drilled is assigned to the State without cost to the latter.

-22-

If any sentence, paragraph, clause or provision of this Drilling Lease Number 224-A as modified shall be held subject to any laws of the State of Florida now in effect, and enacted subsequent to October 4, 1941, and therefore, invalid, then in such case the rights and obligations of the Lessor and Lessee as to the subject matter of such invalid sentence, paragraph, clause or provision shall be governed by the terms of Drilling Lease Number 224-A prior to modification thereof, except that any time or times fixed for performance on the part of either of the said parties under the terms of the lease before modification corresponding to such invalidated portions shall be extended for a reasonable time after final adjudication of such invalidity to permit reasonable compliance tberewith.

-23-

WHEREAS, the United States of America has made claim to the title to some of the areas included within this lease, and

WHEREAS, the United States of America has filed suit against the State of California, being Number 12 Original, 1945 Term, which suit involves the title to and oil rights of Tidewater Lands of the State of California, but may affect the title to some of the areas included within this lease, and

WHEREAS, the Trustees recognize that said claim and suit may place a cloud on the title to some of the areas included in this lease, and

WHEREAS, Lessee does hereby agree to carry out their obligations herein contained without claiming any release from any of said obligations on the basis of the said claim on title except as hereinafter stated, it is hereby agreed by the Trustees that: If a decision adverse to the State of California shall be rendered in said suit by the Supreme Court of the United States, then in that event the Lessee is relieved from any duty to carry out its drilling obligations assumed under this lease as to any five-year period except the first five-year period hereof on any lands the title to which appears to be affected by such decision, and the rentals herein provided for shall be abated proportionately to the extent such decision appears to divest title to part of the lands hereby affected from the State of Florida, until such time as there is a decision rendered by the Supreme Court of the United States quieting title in Lessor or the State of Florida to the areas affected by any adverse decision in the said suit against the State of California; within sixty days after title to said areas is so quieted in Lessor or the State of Florida, Lessee must commence operations to carry out the drilling obligations of this lease and resume payment of the full rentals.

-24-

Lessor finds as a matter of fact that this Lease as modified is of material advantage to the State of Florida; that within the primary term 24,000 feet of well hole must be

drilled, in addition to payment of rentals, whether the wells are drilled or not, and that it is for the best interest of the Trust Fund administered by the Lessors that exploration for and discovery of oil be accomplished as soon as feasibly possible, and that this lease be modified, as well as Leases Nos. 224-B and 248, as modified, most nearly serve such interest.

-25-

The Trustees also find, and it is agreed, that the modification of this lease is not, and is not intended to be, a new agreement or novation.

IN WITNESS WHEREOF, the Trustees of the Internal Improvement Fund of the State of Florida, the Lessor, have hereunto subscribed their names and have caused the seal of the Department of Agriculture of the State of Florida to be hereunto affixed, and the Lessee has caused this instrument to be executed in its name by its Vice President, and its corporate seal to be affixed, attested by its Secretary, as of the date aforesaid."

Executed this 27th day of February, A. D., 1947.

MILLARD F. CALDWELL (SEAL)
Governor

C. M. GAY (SEAL)
Comptroller

J. EDWIN LARSON (SEAL)
State Treasurer

_____ (SEAL)
Attorney General

NATHAN MAYO (SEAL)
Commissioner of Agriculture

ACTING AS AND COMPOSING THE TRUSTEES OF THE INTERNAL IMPROVEMENT FUND OF THE STATE OF FLORIDA

Lessor

COASTAL PETROLEUM COMPANY
(Formerly Arnold Oil Explorations, Inc.)

By J. E. FITZ-PATRICK
Vice President.

Lessee

Attest:

BENJAMIN W. HEATH
Secretary

Signed, Sealed and Delivered in the presence of:

J. THOMAS GURNEY

ANNIE LAURA FOSTER

Approved:

JULIUS F. PARKER

State of Florida,
County of Leon,

BEFORE ME the undersigned authority, personally appeared J.E. Fitzpatrick and Benjamin W. Heath, respectively Vice-President and Secretary of COASTAL PETROLEUM COMPANY, a Florida Corporation, known to me and known to me to be the persons described in and who executed the foregoing instrument for and on behalf of said corporation and who acknowledged before me that they executed the same on such behalf, for the purposes therein expressed, as the free act and deed of said corporation.

And the said Benjamin W. Heath, Secretary of said COASTAL PETROLEUM COMPANY, further acknowledged before me that the corporation seal affixed thereto is the corporate seal of said corporation,; that he affixed the same thereto; that said J.E. Fitzpatrick, who executed said instrument on behalf of said corporation, was at such time of such execution the duly elected and qualified Vice-President of said corporation, duly authorized and empowered, as an executive officer thereof, to act in such behalf, and the acts and doings of said J.E. Fitzpatrick, as said Vice-President, and Benjamin W. Heath, as said Secretary, relative thereto, were pursuant to due and lawful corporate authority.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal at Tallahassee, Leon County, Florida, this 27th day of February, 1947.

Annie Laura Foster,
Notary Public, State of Florida at Large
My Commission Expires: October 10, 1947

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE SOUTHERN DISTRICT OF
FLORIDA, MIAMI DIVISION

NO. 68-951-CA and
69-699-Div.-CA (consolidated)

COASTAL PETROLEUM COMPANY.
a Florida corporation,

Petitioner,

v.

SECRETARY OF THE ARMY OF THE UNITED STATES
OF AMERICA, et al.,

Respondent.

MEMORANDUM OF SETTLEMENT

THIS MEMORANDUM OF SETTLEMENT is made this 6th day of January, 1976, by and between the BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT TRUST FUND OF THE STATE OF FLORIDA, hereinafter called the "Trustees," and COASTAL PETROLEUM COMPANY, a corporation organized under the laws of Florida, hereinafter called "Coastal."

WHEREAS, the Trustees and Coastal entered into modifications of Florida State Drilling Leases 224-A, 224-B and 248 the 27th day of February, 1947. The location of the areas contained within Drilling Leases 224-A and 224-B consist primarily or Florida's offshore lands approximately from Naples to Apalachicola in the Gulf of Mexico extending 10.36 statute miles from Florida's coastline, including

all bays, inlets and rivers flowing into the Gulf in this area. The drilling area contained within Lease 248 consists of approximately two drilling blocks consisting of all the water bottoms lying within the boundaries to Lake Okeechobee and all the water bottoms lying within the boundaries of the following lakes:

Istokpoga	Hatchineha
Kissimmee	Louisa
Apopka (part)	Panasoffkee
George	Tsala Apopka
Lochloosa	St. Johns River

The Leases require annual rental payments and mandatory drilling requirements.

WHEREAS, certain questions have been raised involving the legality of said Leases and the validity of certain waivers or credits granted by Trustees, to wit: whether Coastal has complied with the drilling requirements of the Leases, and whether the Trustees can grant waivers of those drilling requirements, and, as a result, litigation was commenced in the United States District Court in and for the Southern District of Florida, by Coastal seeking a declaration inter alia as to the validity of said Leases. On April 23, 1971, a Final Judgment was entered declaring inter alia the above Leases to be valid and existing. The Trustees then took an appeal to the United States Court of Appeals, for the Fifth Circuit, from said Judgment, and said appeal is now pending in the Florida Supreme Court as a result of a certification by the Fifth Circuit; and

WHEREAS, the Trustees and Coastal now desire to enter into various amendments and changes of the aforesaid Leases in such manner as amicably to clarify the rights and responsibilities of the parties thereto, and to settle, adjust and resolve the differences between them; and

WHEREAS, the Trustees have independently determined that said amendments, changes and clarification will be in the best interest of the State of Florida.

NOW, THEREFORE, the Trustees and Coastal do covenant and agree as follows:

SECTION ONE

PURPOSE

The purpose of this agreement is a compromise between the parties for the complete and final settlement of their claims, differences and causes of action with respect to the dispute described below.

SECTION TWO

STATEMENT OF DISPUTE

The Trustees assert that a final judgment should be entered declaring Florida State Drilling Lease 224-A, as modified; Florida State Drilling Lease 224-B, as modified, and Florida State Drilling Lease 248, as modified, hereinafter referred to as The Leases, each of which leases is between the Trustees and Coastal and dated February 27, 1947, invalid and void. An appeal has been filed in the United States Fifth Circuit Court of Appeals by the Trustees in the case styled Coastal Petroleum Company, a Florida Corporation, Petitioner-Appellee, vs. Secretary of the Army of the United States of America, et al., No.712589, asserting such claim.

Coastal denies the invalidity and/or voidness of the said leases and asks and asserts that the appeal should be denied.

The parties desire to reach a full and final compromise

and settlement of all matters and all causes of action arising out of the facts and claims as set forth above.

SECTION THREE

GENERAL TERMS OF SETTLEMENT

In consideration of the mutual covenants set forth herein, the parties agree as follows:

1. (A) Coastal agrees to reduce and surrender acreage and/or economic interests in the said leases.

(B) Coastal agrees to have rental obligations of the said leases continue on areas as to which it retains any interest.

(C) Coastal agrees to reduce its interest and have the areas in which it retains any residual royalty interest released completely to the Trustees at the end of 40 years from the date hereof. Coastal agrees to have the areas in which it retains any right to explore and develop oil, gas and other minerals released completely to the Trustees within 40 years from the date hereof except that any operations producing oil, gas, or other minerals in economically sustainable quantities at the end of such 40 years shall be permitted to continue subject to the particular lease until such operations cease.

(D) Coastal shall have no right to intervene in any land use decisions within the areas leased other than as to the outermost three miles retained by Coastal. Coastal's only rights as to areas other than the outer three miles and Lake Okeechobee shall be the specified residual royalty on oil, gas, and other minerals. The term "minerals," a used herein, shall not include - among other things - sand gravel or unconsolidated seashells. Any use of minerals other than oil or gas for a public purpose by the Trustees or any government

body so authorized by the Trustees may be made without Coastal's approval and without payment of any compensation or royalties to Coastal.

2. (A) The parties agree that all claims, demands, rights and causes of action that they have against each other with respect to the above-described dispute are satisfied, discharged, and settled.

(B) The Trustees agree to terminate the pending appeal and both parties agree to seek a consent decree based upon the terms hereof, but the failure to obtain a consent decree shall not invalidate the effectiveness of this settlement agreement.

(C) The parties agree that the first sentence of the first paragraph of Article 13 of each of said leases shall be amended to read as follows:

> "The rights of either party hereunder may be assigned in whole or in part only after written consent thereto from the Trustees is first obtained, which consent shall not be unreasonably withheld, and the provision a hereof shall extend to the successors and assigns of the parties hereto, but no change or division in ownership of land rentals or royalties, however accomplished, shall operate to enlarge or diminish the obligations or the rights of either party."

(D) The Trustees agree that drilling obligations under Leases 224-A, 224-B and 248 (as modified) shall be governed by Chapter 20680, Laws of Florida, Acts of 1941, and that all further drilling requirements are hereby waived.

(E) In enforcing its residual royalty rights in

any leased lands, Coastal shall not enter suit against third parties without first notifying the Trustees and offering the Trustees the opportunity to participate in such action. Should the Trustees decline to participate and should Coastal nevertheless pursue litigation that results in a monetary recovery which benefits the Trustees, the Trustees then shall share, pro rata, in the payment of reasonable attorneys fees and court costs, but in no event shall the Trustees be obligated for any fees and costs in excess of their monetary recovery from such litigation.

SECTION FOUR

SPECIFIC PROVISIONS OF SURRENDER AND RELEASE

1. Coastal hereby surrenders and releases to the Trustees, pursuant to Article 16 contained in each of said leases, an area three statute miles wide beginning three statute miles landward from the three league Federal-State boundary and extending the full length of leases 224-A and 224-B.

2. Coastal hereby reduces its interest in all other areas landward of the three statute miles surrendered and released to the Trustees, and including all inland areas except Lake Okeechobee. In these areas, Coastal shall retain only a residual royalty of 6 1/4% on the wellhead value of oil and gas, payable in cash or in kind at the option of Coastal; 25 cents per long ton on sulphur; and 5% of production or of the market value of other minerals, and shall have no other rights whatever except those of a residual royalty right owner.

3. The Trustees simultaneously hereby waive their right to any royalties from Coastal under the terms of leases 224-A, 224-B and 248 from areas described in Paragraph 2 above, and retain full royalty in all other areas subject to said leases.

4. Coastal, recognizing that Lake Okeechobee presents

special problems for preservation of its integrity as a fresh water reservoir vital to southern Florida, agrees that no exploration or development drilling or mining of any kind whatsoever shall be conducted thereon without the prior approval of the Trustees.

5. The current annual rental on Leases 224-A and 224-B now totals $49,614.40. The new annual rental on Leases 224-A and 224-B shall be $39,261, reflecting the reduction of lands leased. The annual rental requirement on Lease 248 shall remain the same, to-wit: $19,985.92.

6. Coastal shall secure permits from all appropriate State environmental protection agencies in compliance with the then existing laws and regulations, prior to any drilling or mining.

In all other respects, other than the amendments related herein, the provisions of the leases remain in full force and effect.

IN WITNESS WHEREOF, the BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT TRUST FUND OP THE STATE OF FLORIDA, the Lessor, have hereunto subscribed their names and have caused the seal of the State of Florida to be hereunto affixed, and COASTAL PETROLEUM COMPANY, the Lessee, has caused this instrument to be executed in its name by its President, and its corporate seal to be affixed, attested by its Assistant Secretary, as of the date aforesaid.

/s/ Reubin O'D Askew
Governor

/s/ Bruce A. Smathers
Secretary of State

/s/ Robert L. Shevin
Attorney General

/s/ Gerald A. Lewis
Comptroller

/s/ Philip F. Ashler
State Treasurer

/s/ Doyle Conner
Commissioner of Agriculture

/s/ Ralph D. Turlington
Commissioner of Education

ACTING AND COMPOSING THE BOARD
OF TRUSTEES OF THE INTERNAL
IMPROVEMENT TRUST FUND OF THE
STATE OF FLORIDA

LESSOR

COASTAL PETROLEUM COMPANY
By /s/Benjamin W. Heath
President

LESSEE

ATTEST:
/s/ Harmon W. Shields
Executive Director
DEPARTMENT OF NATURAL RESOURCES

ATTEST:
/s/ C. Dean Reasoner

Assistant Secretary

Approved as to form and legal sufficiency.
ROBERT L. SHEVIN
ATTORNEY GENERAL
By: /s/ J. Kendrick Tucker
Assistant Attorney General

CHAPTER 90-72

Senate Bill No. 1642

An act relating to environmental resources; amending s. 253.61, F.S.; specifying state lands not subject to oil or natural gas leases; amending ss. 377.24 and 377.242, F.S.; prohibiting permits for drilling and associated construction for exploration or production of oil, gas, or other petroleum products, in a specified area; providing application of the act; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Paragraph (d) of subsection (1) of section 253.61, Florida Statutes, is amended to read:

253.61 Lands not subject to lease.-

(1) Regardless of anything to the contrary contained in this law in any previous section or part thereof, no board or agency mentioned therein or the state shall have the power or authority to sell, execute or enter into any lease of the type covered by this law relating to any of the following lands, submerged or unsubmerged, except under the circumstances and conditions as hereinafter set out in this section, to wit:

(d) Without exception, after July 1,1989, no lease of the type covered by this law shall be granted, sold, or executed south of 26° north latitude off Florida's west coast and south of 27° north latitude off Florida's east coast, within the boundaries of Florida's territorial seas as defined in 43 U.S.C. 1301, ~~subsection (6)~~. After July 31,1990, no oil or natural gas lease shall be granted, sold, or executed covering lands located north of 26°00'00" north latitude off Florida's

west coast to the western boundary of the state bordering Alabama as set forth in s.1, Art. II of the State Constitution, or located north of 27°00'00" north latitude off Florida's east coast to the northern boundary of the state bordering Georgia as set forth in s. 1, Art. II of the State Constitution, within the boundaries of Florida's territorial seas as defined in 43 U.S.C. 1301.

Section 2. Subsection (9) of section 377.24, Florida Statutes, is amended to read:

377.24 Notice of intention to drill well; permits; abandoned wells and dry holes.-

(9) Without exception, after July 1, 1989, no permit to drill a well in search of oil or gas shall be granted south of 26°00'00" north latitude off Florida's west coast and south of 27°00'00" north latitude off Florida's east coast, within the boundaries of Florida's territorial seas as defined in 43 U.S.C. 1301, ~~subsection (6)~~. After July 31, 1990, no permit to drill a well in search of oil or gas shall be granted north of 26°00'00" north latitude off Florida's west coast to the western boundary of the state bordering Alabama as set forth in s. 1, Art. II of the State Constitution, or located north of 27°00'00" north latitude off Florida's east coast to the northern boundary of the state bordering Georgia as set forth in s. 1, Art. II of the State Constitution, within the boundaries of Florida's territorial seas as defined in 43 U.S.C. 1301.

Section 3. Paragraph (a) of subsection (1) of section 377.242, Florida Statutes, is amended to read:

377.242 Permits for drilling or exploring and extracting through well holes or by other means. -- The department is vested with the power and authority:

(1)(a) To issue permits for the drilling for, exploring for, or

production of oil, gas, or other petroleum products which are to be extracted from below the surface of the land, including submerged land, only through the well hole drilled for oil, gas, and other petroleum products.

1. No structure intended for the drilling for, or production of, oil, gas, or other petroleum products may be permitted or constructed on any submerged land within any bay or estuary.

2. No structure intended for the drilling for, or production of, oil, gas, or other petroleum products may be permitted or constructed within 1 mile seaward of the coastline of the state.

3. No structure intended for the drilling for, or production of, oil, gas, or other petroleum products may be permitted or constructed within 1 mile of the seaward boundary of any state, local, or federal park or aquatic or wildlife preserve or on the surface of a freshwater lake, river, or stream.

4. No structure intended for the drilling for, or production of, oil, gas, or other petroleum products may be permitted or constructed within 1 mile inland from the shoreline of the Gulf of Mexico, the Atlantic Ocean, or any bay or estuary or within 1 mile of any freshwater lake, river, or stream unless the department is satisfied that the natural resources of such bodies of water and shore areas of the state will be adequately protected in the event of accident or blowout.

5. Without exception, after July 1,1989, no structure intended for the drilling for, or production of, oil, gas, or other petroleum products may he permitted or constructed south of 26°00'00" north latitude off Florida's west coast and south of 27°00'00" north latitude off Florida's east coast, within the boundaries of Florida's territorial seas as defined in 43 U.S.C. 1301, ~~subsection (6)~~. After July 31, 1990, no structure intended for the drilling for, or production of, oil, gas, or other petroleum products may be permitted or constructed north of 26°00'00" north latitude off Florida's

west coast to the western boundary of the state bordering Alabama as set forth in s.1, Art. II of the State Constitution, or located north of 27°00'00" north latitude off Florida's east coast to the northern boundary of the state bordering Georgia as set forth in s. 1, Art. II of the State Constitution, within the boundaries of Florida's territorial seas as defined in 43 U.S.C. 1301

Each permit shall contain an agreement by the permitholder that the permitholder will not prevent inspection by division personnel at any time.

Section 4. This act does not apply to any lease entered into before the effective date of this act.

Section 5. This act shall take effect August 1, 1990.
Approved by the Governor June 12, 1990.

Filed in Office Secretary of State June 12,1990.

CODING: Words ~~stricken~~ are deletions; words underlined are additions.

STATE OF FLORIDA
Office of the Governor
The Capitol
Tallahassee, Florida 32399-0001

April 18, 2001

The Honorable Gale Norton
Secretary, Department of the Interior
1849 C Street, N.W.
Washington, DC 20240

Dear Secretary Norton:

Thank you for your recent letter. I commend you and all of your new federal government colleagues for taking the long overdue step of designing a comprehensive national energy strategy. The challenge of balancing our desire for greater energy supply independence, greater demand for efficiency and improved environmental performance had been avoided for too long. You deserve much credit for putting these issues at the forefront of public discussion.

I am well aware that as you develop your proposed strategy the federal government is going to be forced to revisit many fundamental issues and longstanding positions. I appreciate that this will require some difficult choices.

In the federally-designated Western and Central Gulf Planning Areas, bordering states have chosen to embrace the benefits that come from offshore oil and gas production and to manage the inherent risks that accompany this activity. In the Eastern Gulf Planning Area, of which more than 95 percent is bordered by Florida, a markedly different choice

has been made.

The vast majority of Floridians recognize that not just their lifestyle, but indeed for many their very livelihoods, are rooted in the knowledge that our coast will be forever free of this risk. While we give up certain economic benefits by making this choice, it is clearly the environmentally correct and economically rational choice for Florida.

Florida has long held that no oil or gas drilling should occur within 100 miles of Florida's coast. My position has been that there should be no such activity in the entire Eastern Gulf. While clearly a more expansive position, I believe it is prudent. Once development crosses into the Eastern Gulf and pipeline infrastructure is installed, there will be little incentive not to expand production to fully utilize the transmission capacity. Further encroachment towards our beaches will become inevitable. That is why the federal government should make its decisions on this issue based on longstanding federal declinations: pursue additional production opportunities where that choice has been made, but do not cross into the Eastern Gulf Planning Area.

Ironically, the pending decision regarding Lease Sale 181 is not only the first serious new effort to advance offshore production in the Eastern Gulf, it would also in its current configuration place drilling platforms well within 100 miles of some Florida beaches. These beaches are considered by many to be among the best in the world. With the recent photographs of the collapsed drilling platform off of Brazil on the front pages of many of our newspapers, there is probably now more unanimity among Floridians on this issue than ever before.

I trust you will take Florida's longstanding and strongly held position into account as you move forward with your

critically important challenge. Know that I stand ready to discuss this with you in more detail if you would ever find that helpful. Thank you for your support.

Sincerely,
/s/
Jeb Bush

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT OF THE STATE OF FLORIDA, IN AND FOR LEON COUNTY

COASTAL PETROLEUM COMPANY, a Florida corporation,

Plaintiff,

vs.

STATE OF FLORIDA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT TRUST FUND,

Defendants.

Case No. 01-101

TRIAL PROCEEDINGS BEFORE THE HONORABLE L. RALPH SMITH, JR.

VOLUME 1
DATE: September 30, 2002
TIME: 9:10 a.m. to 12:20 p.m.
PLACE: Leon County Courthouse Courtroom 3-D
Tallahassee, Florida

REPORTED BY:
Susan C. Riesdorph, RPR, CRR
Riesdorph Reporting Group, Inc.
201 East Kennedy Boulevard, Suite 712
Tampa, Florida 33602

APPEARANCES:

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LORENA HART LUDOVICI, ESQUIRE
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and -
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Attorney for Intervenor Arnold

ALSO PRESENT:

Phillip W. Ware, Coastal Petroleum
Shana Wax, Attorney General's Office
Chris Haley, Trial Exhibits
Mark Corbotte, Trial Exhibits
Chuck Cyrus, Clerk
Debbie Giangrasso, Bailiff

* * * * *

MR. GAYLORD: The next exhibit, Your Honor, is Exhibit 3. And this exhibit is the exhibit of secretary -- excuse me -- I guess it was Secretary Nelson, where he says, "I think it's time for us to get into a severe legal tangle, put our foot down and to bow out the question of the taking and the value of the taking." So, again, Your Honor, this is an admission by a member of the Board of Trustees that the State of Florida does not have the right to take Coastal's leasehold interest without the payment of compensation. The next document, Your Honor, is that -- a document that relates to a memo. It's Exhibit 1363. And then this is a consideration by the State of cancellation of the leases. And it says here, "This action would result in an inverse condemnation suit which could take years to resolve." And to this point, Your Honor, we say there's certainly no kidding about that and that's exactly what's happened. But all of these things, these exhibits, Your Honor, reflect actions on the part of the State of Florida and agencies of the State of Florida that reflect admissions

against that what -- that Coastal has property rights and those property rights are susceptible to the payment of compensation if they're taken. Now, Your Honor, in addition, moving on in the outline, we show on page 5 post conduct -- post 1976 conduct in communications from

Coastal which demonstrate that Coastal believed it has a valid right subject -- a valid property right that existed after 1976, and Coastal behaved in a way that was consistent with their belief in that valuable property right, both in the actions that it took and the work that it performed post 1976. Your Honor, the next item on the outline that shows evidence that we'll produce during the course of this case is that evidence of the fact that there is a State policy in existence against offshore drilling within 100 miles of the coastline of Florida. Your Honor, there are numerous examples of evidence of that policy, which include DEP brochures, letters and statements by the governor, but we think, Your Honor, that nothing makes it any clearer than the statement of the governor in -- on Friday night in his speech, his campaign speech in the debate, where he said offshore drilling off the coast of Florida -- that there will be no offshore drilling off the coast of Florida. We believe, Your Honor, that this is a provision -- not only can you take judicial notice of the other provisions in the outline, but

under 90.202, Subsection 11, that these are facts that are not in dispute within the jurisdiction in which this Court sits, and that is that there is not going to be any drilling off the coast of Florida.

THE COURT: Well, Counsel, that statement is something that is going to be persuasive to the Court, but wouldn't Mr. McBride's statement, if he made such statement that, well, if the oil supply from the Middle East dries up, surely the United States is going to be drilling for oil anywhere they can, and the Gulf of Mexico would not be exempt from it in my administration, that this would be a matter of survival. But then-existing laws may be different if

one governor gets elected or another governor. Is this the type of thing --

MR. GAYLORD: Well, Your Honor, we're dealing with a denial of a permit here. And we're dealing with a climate in which every elected official in the State of Florida now, and any that we know about in the future, are insisting that there will be no drilling off the coast of Florida.

THE COURT: But this denial of a permit doesn't mean that if Coastal applied -- if Mr. McBride won the election or if President Bush invaded Iraq tomorrow that they couldn't apply again and might be granted the permit.

MR. GAYLORD: Well, Your Honor, what the evidence is going to show is that the standards that were used by the State

in denying the permit in this case would result in a denial in each and every case. The reasons that were used in the balancing order of the State of Florida said that it wasn't just this permit location or it wasn't just this time, that the -- it says that the interests of the State of Florida are contrary to having offshore drilling because they want to protect our environment. And there isn't any basis for belief that those -- that those circumstances would be anything different in the future.

THE COURT: Okay.

* * * * *

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT OF THE STATE OF FLORIDA, IN AND FOR LEON COUNTY

COASTAL PETROLEUM COMPANY, a Florida corporation,

Plaintiff,

vs.

STATE OF FLORIDA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT TRUST FUND,
Defendants.

TRIAL PROCEEDINGS BEFORE THE HONORABLE L. RALPH SMITH, JR.

Case No. 01-101

VOLUME 2
DATE: September 30, 2002
TIME: 1:50 p.m. to 5:20 p.m.
PLACE: Leon County Courthouse Courtroom 3-D
Tallahassee, Florida

REPORTED BY:
Susan C. Riesdorph, RPR, CRR
Riesdorph Reporting Group, Inc.
201 East Kennedy Boulevard, Suite 712
Tampa, Florida 33602

* * * * *

* * * * *

THE COURT: Well, I think that partially answers the Court's question. If it was the most fertile soil around for oil, if you just deny permit for that one lease, under your theory, that would not be a total taking. That's just a denial of that permit. If it's a property interest that is compensable under those circumstances for a denial of that permit, your argument is that that would have to be -- you have to have a permit applied for in each location and then an inverse condemnation on each one of them.

MR. MARZULLA: That's correct. And, indeed, Your Honor, as their own witness, Mr. Sorensen, testified regarding Murphy Oil, the policies may change. If this country goes to war with Iraq, if there's a substantial disruption, who knows what changes might occur?

THE COURT: I think that's the -- one of the most critical issues in this case is that current policy of the State of Florida to deny a permit for environmental reasons is going to be a permanent position or did it change when our current governor's brother may invade Iraq? In other words, conditions change. They may very well be drilling in the Gulf of Mexico. White beaches may not be very important to the

people of this state, but does that mean that this testimony is something that is going to be a litigated thing? You're going

to then put on a witness to say there's not a likelihood of He's going to say there is.

* * * * *

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT OF THE STATE OF FLORIDA, IN AND FOR LEON COUNTY

COASTAL PETROLEUM COMPANY, a Florida corporation,

Plaintiff,

vs.

STATE OF FLORIDA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT TRUST FUND,

Defendants.

Case No. 01-101

TRIAL PROCEEDINGS BEFORE THE HONORABLE L. RALPH SMITH, JR.

VOLUME 3
DATE: October 1, 2002
TIME: 9:20 a.m. to 12:33 p.m.
1:40 p.m. to 5:30 p.m .
PLACE: Leon County Courthouse Courtroom 3-D
Tallahassee, Florida

REPORTED BY:
Susan C. Riesdorph, RPR, CRR
Riesdorph Reporting Group, Inc.
201 East Kennedy Boulevard, Suite 712
Tampa, Florida 33602

* * * * *

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MR. MARZULLA: Your Honor, if I may, we are back again to the issue that we faced in the motion to strike originally in this case. What counsel is proposing to do is to argue from these documents that despite the existence of a statute passed by the legislature of the State of Florida establishing standards for issuance of permits, that on the basis of these documents, he can prove that the Department of Environmental Protection will not follow the law, but rather will follow what he purports to state is a policy against oil drilling in state waters. He purports to prove that by introducing letters written by the State to the federal government saying, we oppose your drilling proposals out to a hundred miles off Florida waters. And that's our relevancy objection.

MR. GAYLORD: Your Honor, you have to put all of this in context. The permit was denied on the basis ostensibly of a balancing test, and, that is, applying a balancing test to the interest of Coastal in exercising its drilling rights and the interest of the State of Florida in protecting its shoreline and sensitive environmental areas. What we've been trying to do is put evidence before

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the Court that shows the Court that in each and every case, the environmental issues are so paramount for the State of Florida that there will be no circumstance under which that balancing test, which is the policy of the State of Florida, would ever be balanced in favor of drilling. There is document after document, Your Honor, statement after statement, public statement by the secretary of the DEP, by the governor, by publications put out by the DEP which show their policy in the documents that they're not going to permit drilling off the coast of Florida. They make no distinction between Florida waters and federal waters, nor would any distinction make any sense under the context of their exercise of this balancing test.

Your Honor, one of the things that we're going to offer to you -- and it's -- you can take judicial notice of it, but it's Judge Barfield's questioning of Mr. Glogau at the time that the Coastal versus Wildlife Federation case went before the First DCA. And what he was trying to ask Mr. Glogau, how many permits do you have to apply for before you finally figure out that the State is never going to grant a permit? And there is no place out there on these leases where the State's criteria could be satisfied. This balancing test will never be balanced in favor of permitting regardless of whatever kind of disingenuous statement a lawyer makes in court. And so we're --

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MR. MARZULLA: That was a losing argument before Judge Barfield in the DCA. Counsel is now challenging the decision of the DCA, which can't be done in a taking case. He has to accept that there is a law in the State of Florida. And what he is attempting to assert now is that the public servants who have sworn to uphold that law will

not do so. And if that's the case, let him bring a tort claim. Let him bring a due process claim. That is not a taking case.

THE COURT: Well, Judge Barfield may not have been thinking in terms of the possibility that the State would grant drilling here if there were circumstances that overrode the environmental concerns of clean white beaches and good coral reefs. We have a very high need for producing oil in the Gulf of Mexico because you can't get it anywhere else in the world. I don't know that Governor Bush or the Department of Environmental Protection or any of these other people because they deny a permit right now would mean it's a denial of an application in the future. I think there's a pretty well-known cliche' about it ain't over until it's over. This lease is not over with just because this current administration has articulated a position of no -- they're against drilling within a hundred miles of the coastline.

MR. GAYLORD: Well, Your Honor, the only thing that's different about this situation and what you described is the policy by itself wouldn't produce that conclusion, but the

policy coupled together with a clear permit denial on a permit application requested by Coastal Petroleum makes it clear when the permit denial was issued on the basis of the fact that Coastal can't meet the balancing test, all of this evidence is relevant to the question -- to the issue, Your Honor, that not only could Coastal not meet the balancing test relating to the environment that was imposed upon this permit application, but there is nowhere on Florida's coast where anyone can meet the balancing test. Florida has an adamant declared policy against offshore drilling. Then they've denied one permit. They'll deny every permit. And

there will be no Florida -- no drilling off Florida's coastline. So, Your Honor, that's the essence of this taking case.

THE COURT: Well, I think what that overlooks is the fact that in 1976 when the settlement agreement was negotiated, both parties apparently, according to Dr. Sorensen -- and I haven't heard Mr. Cresse yet, but the testimony of Mr. Heath -- both parties in the negotiating stage recognized that even before the 1976 settlement, before you can get a permit to drill for oil or before you can drill for oil or explore for it, you have to get a permit. And you have to satisfy the then-existing environmental regulations and concerns of the State of Florida.

MR. GAYLORD: Your Honor, you've gotten right down to the nub of this case. And that's where the United States

Supreme Court says no one can ever contract away the police power. And every piece of property is always subject to regulatory requirements. Any land that you own, any land that I own, any land that anybody else in this court owns, any property rights that anybody owns that are exercisable under Florida law are subject to the exercise of the police power and permitting requirements.

And so, Your Honor, what the U.S. Supreme Court has said, what the Florida Supreme Court has said is that if you go too far or you deny investment-backed expectations, that results in a taking.

Now, let me ask you the question this way, Your Honor. Suppose Coastal was presented with a question in this negotiation where the State asked for the inclusion of

paragraph 6 in the document and they said -- the State said, we want to be sure that you'll apply for permits under then-existing rules and regulations, environmental regulations as they exist at the time you apply for the permit. What would Coastal say, no, we refuse to comply with the law? They've complied with the law ever since they owned the leases. And so it was simply an agreement to do what they had always done, Your Honor.

If the simple requirement to comply with environmental regulations extinguishes a property right and puts a property owner in the position of being at the mercy of

the government that any time it chose not to grant a permit there would be no right to use the property, there would be no such thing -- there would be no reason for the Fifth Amendment of the Constitution and there would be no inverse condemnation claims, Your Honor.

THE COURT: Well, we're not here for closing argument, but we've certainly gotten very close to it.

* * * * *

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT OF THE STATE OF FLORIDA, IN AND FOR LEON COUNTY

COASTAL PETROLEUM COMPANY, a Florida corporation,

Plaintiff,

vs.

STATE OF FLORIDA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT TRUST FUND,
Defendants.

TRIAL PROCEEDINGS BEFORE THE HONORABLE L. RALPH SMITH, JR.

No. 01-101

VOLUME 4
DATE: October 2, 2002
TIME: 9:05 a.m. to 11:35 a.m.
PLACE: Leon County Courthouse Courtroom 3-D
Tallahassee, Florida

REPORTED BY:
Susan C. Riesdorph, RPR, CRR
Riesdorph Reporting Group, Inc.
201 East Kennedy Boulevard, Suite 712
Tampa, Florida 33602

* * * * *

MR. ANGERER, SR.: It's a press release of the Department of Environmental Protection. It's not the federal -- it's not a federal press release. And it describes the history of it and also makes clear –

THE COURT: Let me see what it is.

MR. ANGERER, SR.: When the federal government prevented them from moving forward, they went ahead and bought

back the lease. And that -- this document's what she's referring to in the testimony.

THE COURT: It may be evidence of a great waste of money. I don't know. It I could be evidence of anything. But I'm going to receive it into evidence over objection.

(Plaintiff's Exhibit No. 1292.59 received in evidence.)

MR. SCANLAN: What number was that, Bob?

MR. ANGERER: That was 1292.59. Excerpt 235.

> "QUESTION: After your arrival, the oil and gas section falls underneath your jurisdiction, does it not?
>
> "ANSWER: Yes.
>
> "QUESTION: Have you been aware of any rule-making work that has been ongoing by the oil and gas section since your arrival in September of '99?
>
> "ANSWER: At some point, I became aware that they had held one or two workshops prior to my arrival. We did have some discussion internally as to whether there was a requirement to proceed with rule making and made the decision that there was not such a requirement, nor any need. So we have not done so.

"QUESTION: Were you the one that made the decision to stop it? I guess you're the head of that section -- not the section, but the --

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"ANSWER: Well, I'm not the section head, but that is one of the areas that I work with and through a chain of command that report up through me. I would characterize it as making a decision that there was not any -- that there was not a need to proceed further as opposed to stop.

"QUESTION: But that was your decision?

"ANSWER: Yes.

"QUESTION: Did you ever review any of this material after your arrival? Even though the document itself, I think, reflects a workshop in '98, did you review this after you came to the department?

"ANSWER: I do not recall ever reviewing this." The next excerpt is 236.

"QUESTION: I'll show you Exhibit 56, Ms. Edgar. Do you recognize this e-mail?

"ANSWER: I don't think I've seen it before.

"QUESTION: It appears to be an e-mail from Walt Schmidt to Dave Curry --

"ANSWER: Yes.

"QUESTION: -- and speaking of guidance expected from you within two weeks of November 20th, 2001. Did you give that guidance to Mr. Schmidt?

"ANSWER: Ed Conklin, who is the division director, did raise this issue with me. We discussed it. I said that I would like to consult with our Office of General Counsel and

ask either Ed or my assistants at that time to set up a meeting so that we could do that -- do so. "My recollection is that we did arrange a meeting. However, as things happen, it was pushed back and rescheduled a couple of times. So I think it was probably longer than two weeks by the time we actually got together. "We did have a meeting with the Office of General Counsel and Walt and Ed. I don't remember who all else was in that discussion, but at the end of that meeting, the consensus and my agreement was that there was not a need to proceed with rule making. And that was the end of that."

* * * * *

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT OF THE STATE OF FLORIDA, IN AND FOR LEON COUNTY

COASTAL PETROLEUM COMPANY, a Florida corporation,

Plaintiff,

vs.

STATE OF FLORIDA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT TRUST FUND,
Defendants.

Case No. 01-101

TRIAL PROCEEDINGS BEFORE THE HONORABLE L. RALPH SMITH, JR.

VOLUME 7
DATE: October 4, 2002
TIME: 8:17 a.m. to 2:30 p.m.
PLACE: Leon County Courthouse Courtroom 3-D
Tallahassee, Florida

REPORTED BY:
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Tampa, Florida 33602

* * * * *

MR. GAYLORD: Your Honor, I have one thing I would like to take up before Mr. Apthorp is called, because I just received the defendants' outline a few minutes ago, as the Court did. And I would direct you to page 2, which is the top of the outline. And it says that Mr. Apthorp is going to testify to the history of the development of the environmental movement -- that's No. 1, and there's other language in there after that -- the effect of that movement,

and the history of the Secretary of the Army case, the position of the governor's office during settlement negotiations, the purpose of paragraph 6, and the effect of paragraph 6. Now, the purpose of paragraph 6 and the effect of paragraph 6, those are legal issues. We've been talking about expectations, Your Honor, from people who were involved in the negotiation process and facts surrounding it. The history of the environmental movement is not relevant to this case. The effect of the environmental movement is not relevant to this case. The position of the governor's office has nothing to do with the expectations of the parties. Mr. Apthorp is not a trustee and he wasn't involved in the negotiations. And then,

so I'm -- I would object to the testimony. I understand we haven't heard it, but on the basis of the outline that the defendants have given to us here, there's no relevant testimony that's going to be offered by this witness.

THE COURT: Well, it certainly appears to the Court that it's extremely relevant. What we're dealing with here in the State of Florida is -- and your boxes over here tell it all -- history notebooks. You've got boxes and boxes of things about the evolution of the political climate in Florida, which has to do somewhat with this environmental concern. At some point in time, the government wasn't too concerned about environment. Some states still aren't very concerned about it.

MR. GAYLORD: Your Honor, I've made my objection. Whenever I hear the Court say that something is relevant, that's all I need to hear.

THE COURT: I think it's very relevant. And I think what may happen in the future is likewise something that the Court should take into consideration. The likelihood of obtaining oil out there may not be very great right now, but if the need for oil was much greater, then I suspect the State of Florida would be encouraging again the drilling of oil to see whatever can be found. But I think all of these environmental things are relevant.

MR. THOMSON: Your Honor, I trust Mr. Apthorp will not be testifying as to what will occur in the future.

THE COURT: Let's see what questions you ask.

* * * * *

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT OF THE STATE OF FLORIDA, IN AND FOR LEON COUNTY

COASTAL PETROLEUM COMPANY, a Florida corporation,

Plaintiff,

vs.

STATE OF FLORIDA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT TRUST FUND,
Defendants.

Case No. 01-101

TRIAL PROCEEDINGS BEFORE THE
HONORABLE L. RALPH SMITH, JR.

VOLUME 10
DATE: October 8, 2002
TIME: 9:08 a.m. to 4:30 p.m.
PLACE: Leon County Courthouse Courtroom 3-D
Tallahassee, Florida

REPORTED BY:
Susan C. Riesdorph, RPR, CRR
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Tampa, Florida 33602

* * * * *

THE COURT: You do concede that in order for it to be a taking, you have to be deprived of all economic benefits of the property?

MR. GAYLORD: I did not concede that, Your Honor. I told you that there were two prongs. I said the first prong was under the Graham/Penn Central test which talks about the denial and interference of investment-backed expectations -- or the interference with investment-backed expectations. And so that is what the court has called -- the Supreme Court of the United States has called an ad hoc factual inquiry.

THE COURT: What happened to these cases that came out, Lake Tahoe and some of these other decisions that the U.S. Supreme Court -- this is a Court of Claims opinion that I think you must be relying on.

MR. GAYLORD: Well, the most significant decisions that bear on -- that speak to the issue that is before us here, Your Honor, are Lucas and Palazzolo. Lucas was a case that –

and that's also a U.S. Supreme Court case, the Palazzolo case.

THE COURT: Wasn't that Lake Tahoe?

MR. GAYLORD: That was a Supreme Court case, Your Honor. I don't think that has any application to this case.

THE COURT: It doesn't?

MR. GAYLORD: I don't believe it does, no.

THE COURT: Were there regulations?

MR. GAYLORD: You know, I don't have the decision in -- it was a temporary moratorium, Your Honor. It was a different situation than what we're dealing with here. All I can tell you is I don't think we cited that in our brief.

THE COURT: I know you didn't, but I just didn't know if you were familiar with it.

MR. GAYLORD: It's an issue involving temporary moratorium. So --

THE COURT: Total deprivation for a temporary period of time?

MR. GAYLORD: Your Honor, I'm -- honestly, you're asking me questions about a case that I'm not prepared to respond to right now because I didn't cite it. But if that were -- the other cases that we have cited to you deal with the same proposition that, you know, arguably you could have -- you know, the First Lutheran Church case, Your Honor, talks about a temporary taking. So you can have temporary takings. But

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there is no evidence before this Court that this taking is temporary.

* * * * *

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* * * * *

THE COURT: But you have to assume that for the purpose of your theory here that the environmental concerns will always be the same as they are now, they will override the State's desire to have oil produced there forever. Therefore, you've lost all potential use of the property.

MR. GAYLORD: That's correct, all economically viable use, Your Honor.

THE COURT: Regardless of what may take place in Iraq tomorrow or Iran or Saudi Arabia or any of the oil-producing countries where we may be greatly curtailed in our supply of oil and there will be a big need to explore out here in the Gulf, you still have to assume that environmental concerns will always override.

MR. GAYLORD: That's what the statute says, Your Honor. But I would call to the Court's attention that I specifically asked Governor Askew, what happened when we -- we had such a significant crisis in the '70s when he was governor, Your Honor, that if you will recall, there were lines at gas

stations that went on for miles, people waiting to buy gas, just to get into the gas station for an opportunity to buy gasoline. And what Governor Askew said was -- and I asked him, while you were in office, did you recall whether there was an oil crisis? Yeah. He said, yes, the oil shot -- I don't remember that term, but that how he --

MR. THOMSON: Shock, s-h-o-c-k.

MR. GAYLORD: Oil shock. Okay. And did that crisis have any material effect that you can recall on the environmental movement? No, sir. We were going full steam ahead on the environmental movement during that period of time. Now, one of the -- so, you know, that's the -- that was much more severe than anything that we've known since the mid '70s. You know, Lord help us, we -- I hope that we won't go through anything like that again.

THE COURT: Well, that was '73 and over and done with by the '76 agreement.

MR. GAYLORD: That's correct, Your Honor. But the reason why we looked at it is because in that time frame, there's no -- you know, there's no expectation in -- that if you have a crisis like that that is going to do anything to change the type of application or the type of policy argument that the

State is using now to deny this permit. And so the only reason we looked at that, Your Honor -- and I asked him

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the question really not knowing exactly what he was going to say about it, but he -- his point, the defendants have argued this environmental movement somehow put Coastal on notice that they wouldn't be able to use their property. Your Honor, our counterpoint argument to that is really twofold. First of all, you can't put somebody on notice that you're going to restrict the use of their property and then claim you're excused by virtue of that notice from paying compensation if what you do goes so far as to deny them all use of the property. There is no basis under law for saying that that kind of notice excuses the defendants from anything.

* * * * *

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REPORTER'S CERTIFICATE

STATE OF FLORIDA:
COUNTY OF HILLSBOROUGH :

I, Susan C. Riesdorph, RPR, CRR certify that I was authorized to and did stenographically report the foregoing proceedings and that the transcript is a true and complete record of my stenographic notes.

I further certify that I am not a relative, employee, attorney, or counsel of any of the parties, nor am I a relative or employee of any of the parties' attorney or counsel connected

with the action, nor am I financially interested in the outcome of the foregoing action.

Dated this 21st day of November, 2002,
IN THE CITY OF TAMPA,
COUNTY OF HILLSBOROUGH,
STATE OF FLORIDA.

_____/s/_____
Susan C. Riesdorph, RPR, CRR

(2)

Supreme Court, U.S.
FILED
MAY 12 2004
OFFICE OF THE CLERK

No. 03-1412

In The
Supreme Court of the United States
October Term, 2003

COASTAL PETROLEUM COMPANY, CHARLES E. ARNOLD, et al., and ROBERT W. CLARK, et al., Petitioners,

v.

STATE OF FLORIDA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT TRUST FUND, Respondents.

On Petition For A Writ of Certiorari To The District Court of Appeal, First District, State of Florida

---

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QUESTION PRESENTED

Whether a trial court's determination under the Florida Constitution that denial of a drilling permit at one particular location did not constitute a taking of a 400,000-acre drilling lease is anything more than application of the law of takings (here, of a contract right) to the specific facts as determined by the court.

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STATEMENT REGARDING JURISDICTION

No federal question was presented to or ruled upon by the court below because Petitioner, Coastal Petroleum Company ("Coastal"), purported to reserve federal questions for potential litigation in federal court. Therefore, this court lacks jurisdiction under 28 U.S.C. § 1257(b) and the petition should be denied.

CONSTITUTIONAL PROVISION INVOLVED

The only constitutional provision involved below was article X, section 6(a), of the Florida Constitution: "No private property shall be taken except for a public purpose and with full compensation therefor paid to each owner or secured by deposit in the registry of the court and available to the owner."

STATEMENT OF THE CASE

Respondents incorporate by reference the Findings of Fact of the trial court (Petitioners' App. at 3-9 [Final Judgment]), on which this Statement of the Case is based.

Lease 224-A was one of three drilling contracts termed "leases" granted in the 1940's to the predecessor of Coastal by the Board of Trustees of the Internal Improvement Trust Fund of the State of Florida ("Trustees"). In 1976, Coastal and the Trustees entered into a Memorandum of Settlement, incorporated into a consent decree (collectively, the Memorandum of Settlement"), settling litigation over the validity of its leases. (Pet. App. at 167-175). The Memorandum of Settlement modified Coastal's existing lease agreements to provide a new "paragraph 6 of the Surrender of Rights section."

> Coastal shall secure permits from all appropriate State environmental protection agencies in compliance with the then existing laws and regulations, prior to any drilling or mining.

(Pet. App. at 4.) While agreeing to the addition of this provision, Coastal was released from its "financially onerous drilling obligations." (Pet. App. at 6)

In a seven day trial, the court took evidence on the circumstances surrounding the creation of paragraph 6, finding that this provision made Coastal's right to drill for oil and gas a conditional right and that permits could be denied if Coastal was unable to satisfy environmental concerns. (Petitioners' App. at 7 [Final Judgment].)

The trial court further found as to this provision:

> The primary objective of the State in pressing for the provisions of what became Paragraph 6 of the Memorandum of Settlement was to ensure that any future activities on Coastal's leases would have to comply with all state environmental requirements applicable at the time of the activity and that unless Coastal could obtain state permits in compliance with these environmental requirements that it would have no right to drill on state owned submerged lands.
>
> (Pet. App. at 6-7 [Final Judgment]).[1]

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[1] Petitioner generally ignores the trial court decision that it is asking this Court to review, instead citing to the denial of the State's motion to dismiss , other pleadings, and colloquies between the court

Coastal applied for a permit to drill on Lease 224-A. The denial of that permit served as the basis for Coastal's claim that the Respondents "took" its lease. The trial court determined, based on the testimony of expert witnesses, that Coastal had failed to prove that this particular permit denial deprived Petitioner of all economically beneficial use of its 400,000-acre drilling lease, made the lease worth any less than it had been worth before, or curtailed any reasonable investment-backed expectations. (Petitioners' App. at 7-8 [Final Judgment].)

Accordingly, based on its extensive findings of fact, the court entered judgment in favor of the Defendants.

The First District Court of Appeal affirmed *per curiam* without an opinion. *Coastal Petroleum Co. v. Florida Dep't of Envtl. Protection*, 864 So. 2d 402 (Fla. 1st DCA 2004) (Petitioners' App. at 1).

REASONS FOR DENYING WRIT

This case addresses whether a Florida appellate court correctly affirmed a trial court's conclusion, based on extensive factual determinations, that Coastal failed to prove a taking under the Florida Constitution. The case does not address "the right to protection under the Takings Clause [of the United States Constitution] of an oil and gas lease . . . ." (*See* Pet. at 3.) This case represents nothing more than application of state law to specific, judicially determined facts. Certiorari is therefore inappropriate.

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and counsel during trial. (Pet. at 9-10, 20, 22-24.)

1. No Federal Question

For Supreme Court review to be appropriate, a federal question must be presented to, and necessarily decided by, a state court of last resort. *Street v. New York*, 394 U.S. 576, 581-82 (1969); 28 U.S.C. § 1257 (describing this Court's jurisdiction to decide questions of federal law); Sup. Ct. R. 10 (describing certiorari review of "an important federal question"). Review is inappropriate if a party chooses to reserve any purported federal claim for later litigation in federal court. *See NAACP v. Button*, 371 U.S. 415, 427-28 (1963) (review allowed when a party litigates both federal and state claims in state court instead of reserving its federal claims).

Coastal purported to make precisely such a reservation in the present case. Omitted from Petitioners' Statement of the Case is the fact that Coastal stated it was bringing the action below solely under the Florida Constitution, not under the United States Constitution. Petitioners' complaint expressly reserved all claims under federal law to be brought later in federal court:

> COASTAL hereby reserves the right to all claims over which subject matter jurisdiction presently lies, or which may later become ripe, in the courts of the United States. This reservation of claims for later adjudication in federal court, if necessary, is made pursuant to *Jennings v. Caddo Parish School Board*, 531 F.2d 1331 (5th Cir. 1976), cert. denied, 429 U.S. 897 (1976), as applied to claims by COASTAL in this Florida court.[2]

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[2] *Jennings* held that a party wishing "to reserve . . . constitutional claims for subsequent litigation in federal court" must make "on the state record a reservation to the disposition of the entire

(R. at 24 [Complaint].) Thus, according to Petitioners' own theory of the case, the state court had no jurisdiction over, and did not decide, the Fifth and Fourteenth Amendment issues.[3]

The trial court judgment that Petitioners are challenging relies only on Florida law. The Takings Clause of the United States Constitution was not at issue below. (Petitioners' App. at 2-3, 9-11 [Final Judgment].) Because Florida law is similar to federal law, the parties' oral arguments and appellate briefs referred to federal cases as well as to state cases. However, the question decided below – by Petitioners' choice – was only whether a particular permit denial constituted a taking under article X, section 6, of the Florida Constitution. (*Id.* at 2.)

2. No Misstatement of the Law

Petitioners allege only misapplication rather than misstatement of the law. (*See* Pet. at 12, 14 [alleging that the trial court "misapplied" this Court's precedents].) Certiorari review "is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law." Sup. Ct. R. 10. For reasons both of comity and practicality, the Court avoids unnecessary review of state judgments. *Adams v. Robertson*, 520 U.S. 83, 90-92 (1997). Certiorari review is granted "only for compelling reasons," for example, a state court of last resort has decided an important federal question in a way that conflicts with another highest state court, a United States court of appeals, or this Court; or a state court has decided an important question of federal law that is unsettled. Sup. Ct. R. 10; *see also Braxton v. United States*,

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case by the state courts." 531 F. 2d at 1332.

[3] Respondents do not concede the validity of Coastal's purported reservation and will raise all defenses they may have to any future case that any of the Petitioners may bring in federal court.

500 U.S. 344, 347 (1991) ("A principal purpose for . . . certiorari jurisdiction . . . is to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law").

Petitioners have shown no necessity for this Court to review the state trial court's decision below. The trial court neither misstated any rule of law nor decided an unsettled question. Petitioners suggest mistakenly that the law is unsettled concerning property interests having a single use. (Pet. at 12.) The Court has frequently addressed single-use property interests. *See, e.g., Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987) and *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922) (coal mining rights); *Hodel v. Irving*, 481 U.S. 704 (1987) (right to devise fractional interest in land); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980) (right to receive interest on interpleader fund). In a breach of contract context, the Court addressed a drilling lease similar to Coastal's. *See Mobil Oil Exploration & Producing Southeast, Inc., v. United States*, 530 U.S. 604, 615 (2000) (federal oil and gas lease contractually subject to existing and future conservation regulations).[4]

Petitioners also suggest that the trial court misapplied the Court's precedents to create *per se* rules that: 1) property subject to permitting is not protected by the takings clause, and 2) a policy prohibiting use of property will not result in a taking if the policy may change. (Pet. at 11, 19.) However, the judgment does not support this suggestion. Petitioners refer repeatedly to a "policy" prohibiting drilling throughout Coastal's 400,000-acre lease, (Pet. at 6, 10, 20-25), but omit to

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[4] In *Mobil*, unlike the present case, the government had breached its contract by failing to follow applicable law. *Mobil*, 530 U.S. at 620-21, 607 (allowing restitution damages).

state that the Florida statutory prohibition against future drilling on submerged lands expressly *excludes* pre-existing leases such as Coastal's. Ch. 90-72, § 4, Laws of Fla., codified at Fla. Stat. § 377.242 (2003).

The only "policy" relevant to this case was the case-by-case balancing of statutory criteria that the Florida Department of Environmental Protection (DEP) must conduct in making decisions regarding drilling permits. Fla. Stat. § 377.241 (2003); (*see* Petitioners' App. at 53 [DEP Final Order]) (stating that such balancing of criteria is a policy matter for the agency rather than a fact-finding matter for the administrative law judge). If DEP *had* applied a blanket prohibition to Coastal's leases instead of balancing specific statutory criteria, the permit denial would have been overturned on appeal because DEP's action would have been contrary to sections 377.241 and 377.242, Florida Statutes. Instead, DEP's interpretation of its permitting statute, and its application of the required balancing, were upheld as consistent with legislative intent, *Coastal Petroleum Co. v. Florida Wildlife Federation, Inc.*, 766 So. 2d 226, 228 (Fla. 1st DCA 2000), and not further challenged.

The trial court's findings were based on particular facts with regard to one particular permit denial, not on *per se* rules with regard to a blanket prohibition. The trial court found, based on its detailed evidentiary findings, that Petitioner had not proved a taking:

> The Court finds that Coastal has failed to prove by the greater weight of the evidence that the value of the lease was less after the 1998 permit denial than it was before that denial. Therefore, the Court finds that there has been no diminution in value of Lease 224A as a result of the denial of Permit 1281.
>
> ***

> The Court finds that Coastal has not been denied all of its economically beneficial use of its property and that the denial of an application to drill on one location within a 400,000 acre lease does not constitute a taking.
>
> ***
>
> Based upon the above findings and the many facts in the record which provide additional credible support for these findings, it is the opinion of this Court that Plaintiff has not established by the greater weight of the evidence that there has been a taking of Lease 224A.
>
> ***
>
> The evidence shows no diminution in value in the lease as a result of this denial of one permit application on a 400,000 acre lease.

(Petitioners' App. at 7-8, 9, 11 [Final Judgment].)

The trial court also found, based on the circumstances surrounding Petitioner's particular contract with the Trustees, that Petitioner's right to drill under the settlement of 1976 was thereafter wholly contingent; Petitioner accepted the risk that it might be denied a particular permit:

> The Court finds, based upon the testimony of the negotiators as well as the documentary evidence, that Paragraph 6 of the [1976] Memorandum of Settlement was intended to ensure that Coastal's right to drill for oil and gas would be a conditional right, so that it would only possess a right to drill for and take oil and gas if it could obtain state permits to do so under the then existing laws, and would only be able to obtain such permits if it could satisfy environmental concerns.

(*Id.* at 5) Given the nature of Coastal's contract, as modified by the 1976 Memorandum of Settlement, the trial court found: "Coastal's post-settlement agreement expectations could only reasonably be that it could drill only if it received a permit, and that such a permit might in fact be denied." (*Id.* at 11.)

The Final Judgment makes clear that the trial court based its conclusions on the evidence before it, not on any *per se* rule of law.

3. Highly Particularized, Fact-based Decision

Because the decision below fails to contain any of the sweeping pronouncements alleged by Petitioners, the question offered for this Court's review is simply the same as that offered to the state appellate court -- whether the trial court's findings were supported by substantial evidence. Certiorari review is rarely granted "when the asserted error consists of erroneous factual findings." Sup. Ct. R. 10. There is no basis for such review in this case.

This Court has held that the question whether a plaintiff has been deprived of all economically viable use of its property is predominantly a question of fact. *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 720 (1999). Questions concerning the nature of Coastal's contractual interest and its reasonable, investment-backed expectations are also fact-intensive. *See Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 303 (2002) ("[T]he default rule remains that a fact specific inquiry is required in the regulatory taking context"). The trial court conducted such a "fact specific inquiry."

The trial court based its findings on hearing seven days of testimony, considering more than 200 documentary

exhibits, and weighing the credibility of the witnesses. (Petitioners' App. at 3 [Final Judgment].) Coastal successfully opposed the Trustees' motion to exclude parol evidence (R. XXV at 4817, 4819); hence, in order to interpret the nature of Coastal's rights under its contract, the court made extensive factual findings concerning the circumstances surrounding negotiation of the 1976 Memorandum of Settlement. (Petitioners' App. at 5-7 [Final Judgment].) The trial court also weighed and resolved the credibility of the parties' expert witnesses. (Petitioners' App. at 8-9.)

Certiorari is inappropriate to review the trial court's application of established law to the particularized facts found below and upon which the trial court based its decision.

CONCLUSION

For all the above reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Supreme Court, U.S.
FILED
MAR 2 1 2004
OFFICE OF THE CLERK

No. 03-1412

IN THE
Supreme Court of the United States

Coastal Petroleum Company, Charles E. Arnold, et al., and Robert W. Clark, et al.,

Petitioners,

v.

State of Florida, Department of Environmental Protection, and Board of Trustees of the Internal Improvement Trust Fund

Respondents.

Petition for Writ of Certiorari to the District Court of Appeal, First District, State of Florida

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CORPORATE FILER PROVISION

Pursuant to Supreme Court Rule 29.6, Coastal Petroleum Company, as a corporate filer, hereby states that as listed in its Petition for Writ of Certiorari, Coastal Caribbean Oils & Minerals, Ltd. is its parent company.

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IN THE

Supreme Court of the United States

Coastal Petroleum Company, Charles E. Arnold, et al., and Robert W. Clark, et al.,

Petitioners,

v.

State of Florida, Department of Environmental Protection, and Board of Trustees of the Internal Improvement Trust Fund,

Respondents.

Petition for Writ of Certiorari to the District Court of Appeal, First District, State of Florida

REPLY BRIEF

1. Supreme Court Review Is Appropriate.

Coastal included a reservation of federal issues in its complaint in state court, however, that reservation was ignored by the trial court and the State. Because of federal case law and issues raised by the court and State in the trial proceedings, Coastal is forced to bring this Petition to ensure its federal claims will be heard.

The State wants it both ways: no Supreme Court review **because of** the reservation and no subsequent federal trial **despite** the reservation. The State asks this Court to

deny jurisdiction based upon a reservation it refuses to concede is valid. (Brief in Opposition at 5 FN3) The position stated in footnote 3 of the Brief in Opposition is just the reason Coastal was forced to file its Petition with this Court. Coastal included a reservation in its complaint, but federal law and issues were raised by the Respondents and the trial court such that if Coastal merely filed suit in federal trial court, the State would argue as it does in its brief, that Coastal's reservation did not fully preserve its federal claims. (Brief in Opp. at 4-5). The State cannot be allowed to use Coastal's reservation as a mechanism to completely deny Coastal any federal forum in which to address its federal claims.

Property owners are compelled to bring their takings claims first in state court because of federal ripeness requirements. *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 186, 194-97 (1985). Should the state court not find a taking, upon filing a federal takings claim in federal court, the property owners face arguments such as those foreshadowed in the Brief in Opposition. *See generally*, *Fields v. Sarasota Manatee Airport Authority*, 953 F. 2d 1299 (11th Cir. 1992). In the Eleventh Circuit, a reservation has been recognized by which a party can preserve its federal takings claim without first filing in federal court, by making a reservation on the record in state court. *Jennings v Caddo Parrish School Bd.*, 531 F.2d 1331 (5th Cir.), *cert. den.*, 429 U.S. 897 (1976).

Coastal sought to preserve the right to have a federal trial court review its federal claims by including a *Jennings* reservation in its complaint. (Record at 24 [Complaint]) However, during the trial proceedings, the trial court and the State ignored that reservation. They used federal precedent based upon and interpreting the Fifth Amendment to the United States Constitution to reduce the scope of

constitutional protection against the taking of private property without payment of compensation. (Petition Appendix at 204-05) In particular, the State argued that an agreement to comply with permitting laws and regulations transformed the regulations into background principles, inherently limiting the property. (Pet. App. at 22 [Trustees' Answer], at 25 [DEP Answer]) The trial court accepted the arguments and concluded that the property became conditional and constitutionally unprotected against a taking until a permit had been obtained. (Pet. App. at 5,7 [Final Judgment])

Despite Coastal's reservation, the federal precedent raised, distorted and applied by the trial court and the State forced Coastal to Petition this Court to address these issues or face the argument that no federal issues remained to be addressed. (Brief in Opp. at 5 FN3) Coastal does not have the luxury of waiting to see if a federal trial court will decide that the trial court and State sufficiently raised federal issues so that they should have been addressed here on certiorari rather than in a subsequent federal proceeding. *See, Adams v. Robertson,* 520 U.S. 83, 88 (1997) (regarding the raising of federal issues through the reliance on federal cases).

For years the State has sought to delay or prohibit drilling until either the leases or Coastal expired. The State has succeeded so far and should not be allowed to simply wage a war of attrition because it has the unlimited resources to do so. The constitutions of both Florida and the United States demand otherwise.

Supreme Court review is appropriate to ensure that Coastal's federal claims will be heard by a federal court.

2. The Misstatements Of The Law Cannot Be Allowed To Stand.

The State clearly misread Coastal's Petition if it believes there were only allegations of misapplication of "properly stated rule of law." (Brief in Opp. at 5) In its Petition, Coastal alleges that the lower court's reading of this Court's decisions was not "properly stated rule of law," but was a "gross distortion" of the law. (Petition at 19) Much more than mere misstatements of law though, the trial court attempted to turn back time and ignore modern regulatory takings law. (Pet. at 14) Those distortions or "misstatements" of law are foundationally erroneous and cannot be allowed to persist.

The entire focus of the proceeding below was incorrect and is encapsulated in the Brief in Opposition. The focus of the trial should have been on the effect of the application of the regulation to the property. *See*, *State v. Burgess*, 772 So. 2d 540, 542 (Fla. 1st DCA 2000) Instead the focus of the trial was on the effect of Coastal's agreement to abide by the law. The State and trial court were focused on whether or not the property was subject to regulations when the trial should have focused on what effect the application of those regulations had on Coastal's lease. *Id.* This misplaced focus is summed up in the Respondents' reliance on *Mobil Oil Exploration & Producing Southeast, Inc. v. United States*, 530 U.S. 604 (2000), to show that an oil and gas lease is **subject to** existing and future conservation regulations. That does not end the inquiry in a takings case, it is the beginning point from which the effect of the regulations is determined. Even so, in that case Mobil received compensation when the government that sold it the lease subsequently prohibited the only use under the lease. *Id.*

Respondents' citation to several cases in which this Court dealt with single use property actually supports Coastal's reasons for granting the Writ of Certiorari. As set out in the Petition, this case offers the unique opportunity to address important questions without the clutter of questions about other possible uses. The single use property takings cases cited by the Respondents are some of the most often cited and quoted cases in regulatory takings jurisprudence, if not all takings jurisprudence. Hardly a takings case is written without citation to *Pennsylvania Coal v. Mahon*, 260 U.S. 393 (1922), and the others, *Keystone Bituminous Coal Ass'n. v. DeBenedictis*, 480 U.S. 470 (1987) and *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980), have been cited literally hundreds of times as well. This case too offers the Court a unique opportunity to cleanly address issues and it could also become a benchmark case in regulatory takings law.

There are several issues that should be determined in this case that would have lasting impact in takings law. One of the central questions to be addressed is whether regulations can become background limitations on property through the passage of time or agreement to abide by the law. (Pet. at i) Another is whether one has the right to use property in a given way before the government grants that right through a permit or whether that use springs to being upon issuance of a permit. Still another is whether the State may avoid a taking simply by claiming that its current policy prohibiting the use of property may change. (Pet. at i) Maybe the most basic issue to be addressed is whether the State may deny the only use for a single use property it sold to Coastal without paying compensation.

In an attempt to show detailed evidentiary findings, the State quotes four paragraphs of the Final Judgment in its Brief in Opposition, those paragraphs are actually telltale

manifestations of an underlying blanket assumption. (Brief in Opp. at 7-8) Clearly, the State used policy to deny Coastal's drilling permit. (Pet. App. at 53 [Final Order]) Subsequently at trial, no evidence was presented nor assurances given that the policy would change or not be applied. Despite the application of that policy and the denial of a permit for the only use of the lease, the Court determined that there was no diminution in value and that since the property was larger than this one location, Coastal should apply for a permit elsewhere. The necessary assumption underlying those findings is that the known policy either would change or would not be applied to other locations. The State offered no evidence to support either conclusion. That is evidence of blanket assumptions, not detailed evidentiary findings. Coastal is not ignoring the Final Judgment (Brief in Opp. at 2), but is trying to expose the rationale and assumptions which gave rise to it, and which were omitted from the Final Judgment prepared by the State.

Essentially the State would be happy to carve away at Coastal's property by refusing to allow drilling on a piece at a time, until finally the lease expires - all the while portraying their action as limited to individual locations. The law protects property owners against such incremental takings and does "not require the submission of further and futile applications" to use property. *See*, *Palazzolo v. Rhode Island*, 533 U.S. 606, 626 (2001). It is absurd to say Coastal cannot drill where it expects there is oil, but may be able to drill somewhere else whether oil is expected there or not.

The State's suggestion that since there is no **express** policy applicable to this lease means that their use of policy on a case by case basis is limited to one location is hollow. (Brief in Opp. at 7) The State's application of policy to overcome facts is as applicable to one location as any other location since the entire lease is comprised of similarly

situated submerged lands offshore Florida. The State's attempt to portray its policy in piecemeal style is illogical and meant only to escape liability for compensation. That certainly is not the way the State has portrayed its policy to the public and to the federal government. (Pet. App. at 181 [Plaintiff's Exhibit 1402 – Letter from Governor Bush to Secretary of the Interior]) The State is acting like a hooked fish that will try any trick or maneuver to get off the hook and avoid being caught.

The gross distortions and ignoring of federal precedent by the trial court is properly addressed to this Court and should not be allowed to stand.

3. This Case Does Not Require A Highly Particularized, Fact-Based Decision.

By attempting to eschew the broad implications of its policy, decision and actions toward Coastal, the State tries to cast this case as a run of the mill regulatory takings case. Coastal is not here contesting the erroneous factual findings of the lower court, but its gross distortion and misapplication of federal takings law that was originally created by this Court in interpreting the Fifth Amendment to the United States Constitution.

In *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), this Court created an exception to the fact specific inquiry used in regulatory takings cases. While the "default rule" requires "a more fact specific inquiry," "the categorical rule in *Lucas* was carved out for the 'extraordinary case' in which a regulation permanently deprives property of all value... ." *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 332 (2002). This is just such an extraordinary case. Through its indefinitely applied policy, the State has

permanently deprived Coastal of the only use it ever had through its time limited lease. The State's argument for application of a fact specific inquiry is based squarely on its pathological denial before courts of the existence and effects of its policy.

It is disingenuous at best for the State to continue to brandish its policy against offshore drilling to the whole world and to deny it before the courts. John Kerry recently discovered how dearly that policy is held by the State when even the possibility that he might have suggested drilling in the Gulf of Mexico off Florida's Coast was attacked by Governor Bush and later refuted by Kerry's campaign as an obvious mischaracterization. *See*, Clark, *Kerry in Spat on Florida Oil Drilling*, The Miami Herald, Apr. 22, 2004. ("'There's probably 10 percent of the people of this state that would support a candidate for higher office that believes what John Kerry believes,' Bush said.") The State's policy is notorious and continues today.

The State is not stupid though. It does not want drilling, but it does not want to pay for a taking either, so it presents itself as walking a tightrope. It only reveals glimpses of its underlying policy as needed to prevent drilling, while denying the existence of the policy to prevent the finding of a taking. It clearly recognizes that a "blanket prohibition" may have been overturned, (Brief in Opp. at 7), or would have been a blatant taking, but without the use of policy it would have been forced on the facts to issue the permit to drill.

The only extensive fact finding in these proceedings was by the Administrative Law Judge when she found, based upon 52 pages of factual findings, that Coastal should be issued a permit to drill. (Pet. App. at 55-132 [Recommended Order]) The State used policy to balance those facts away and deny the permit to drill. (Pet App. at 53 [Final Order])

Faced with the possibility of the policy resulting in a taking, the State retreated into facts, claiming they controlled the taking determination. The critical fact here is, the State's application of policy, "based on its determination that there is a compelling public purpose in not allowing [Coastal] to drill off shore, effectively prevents [Coastal] from exercising its rights under the contract." *Coastal Petroleum Co. v Florida Wildlife Federation*, 766 So. 2d 226, 228 (Fla. 1st DCA 1999). All use of the lease being denied, the *Lucas* categorical analysis is the proper analysis to use, not a fact specific inquiry.

The State recites the number of exhibits and days at trial for the proposition that it was a factual decision which is not appropriately addressed by this Court. What the State fails to point out is that immediately following that presentation of evidence and closing arguments, the trial judge made his oral pronouncement and decided the case from the bench. He was able to do that at least in part because of the interpretation he stated just prior to announcing his decision, that the *Tahoe-Sierra* case held that temporary moratoriums do not effect a taking. (Pet. App. at 204-05)

This case is not a highly particularized, fact-based decision and requires nothing more than the proper application of the "properly stated rule of law" as to categorical takings as set out in *Lucas*. This case is, however, extremely important given the impact it can have on takings law and the potentially billions of barrels of oil resting off of Florida's coast. (Pet. at 18)

CONCLUSION

Certiorari should be granted to review the judgment of the First District Court of Appeal, State of Florida in *Coastal Petroleum Company v. State of Florida, et al.*, 864 So. 2d 402 (Fla. 1st DCA 2004).

Respectfully submitted,

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May 21, 2004